SUPREME COURT, U.S.
FILED

02 1749 MAY 22 2003

No. 02-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HI-HEALTH SUPERMART CORPORATION,

Petitioner,

v.

JILL LANSDALE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE ALLEN KATZ
BENNETT EVAN COOPER
STEPTOE & JOHNSON LLP
Collier Center
201 East Washington Street
Suite 1600
Phoenix, AZ 85253
(602) 257-5200

CHARLES G. COLE
Counsel of Record
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Petitioner

180847

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

102 pp

QUESTIONS PRESENTED

1. Does gender-related banter, unaccompanied by any touching, sexual overture, or discrimination in employment terms or opportunities, give rise to a "hostile working environment" for purposes of a sexual harassment claim under Title VII?

2. Does the existence of a hostile working environment present a question of law for the court, or solely a question of fact for the jury?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Hi-Health Supermart Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xii
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement	2
1. Introduction and Summary	2
2. Background of the Case	4
3. Proceedings Below	8
a. District Court	8
b. Court of Appeals	8

Contents

	Page
Reasons for Granting the Petition	9
I. The Ninth Circuit Has Failed to Confine Title VII to the Bounds Set by this Court's Decisions.	9
II. The Circuits Are in Conflict As to the Whether the Conduct at Issue Can Give Rise to a Hostile Working Environment.	13
A. The Circuits Are Split on Whether There is a "Safe Harbor" for Gender-Related Teasing.	13
B. The Circuits Are Divided on the Underlying Purpose of Title VII.	18
III. The Circuits Are in Conflict as to Whether the Existence of a Hostile Environment Is a Question of Law or Fact.	21
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Alagna v. Smithville R-II Sch. Dist.,
324 F.3d 975 (8th Cir. 2003) 24

Aman v. Cort Furniture Rental Corp.,
85 F.3d 1074 (3d Cir. 1996) 18

Amirmokri v. Baltimore Gas & Elec. Co.,
60 F.3d 1126 (4th Cir. 1995) 22

Andrews v. City of Philadelphia,
895 F.2d 1469 (3d Cir. 1990) 19

Aramburu v. Boeing Co.,
112 F.3d 1398 (10th Cir. 1997) 18

Baggett v. Bullitt, 377 U.S. 360 (1964) 20

Bales v. Wal-Mart Stores, Inc.,
143 F.3d 1103 (8th Cir. 1998) 25

Barbour v. Browner,
181 F.3d 1342 (D.C. Cir. 1999) 23

Baskerville v. Culligan Int'l Co.,
50 F.3d 428 (7th Cir. 1995) 14, 15, 24

Black v. Zaring Homes, Inc.,
104 F.3d 822 (6th Cir. 1997) 24

Cited Authorities

Page

Bowman v. Shawnee State Univ.,
220 F.3d 456 (6th Cir. 2000) 24

Breda v. Wolf Camera, Inc.,
148 F. Supp. 2d 1371 (S.D. Ga. 2001) 13, 20

Buckner v. Gen. Signal Tech. Corp.,
163 F. Supp. 2d 617 (W.D.N.C. 2000) 16-17

Clark County Sch. Dist. v. Breeden,
532 U.S. 268 (2001) 3, 11, 12, 17, 21

Crawford v. Medina Gen. Hosp.,
96 F.3d 830 (6th Cir. 1996) 22

DeAngelis v. El Paso Mun. Police Officers Ass'n,
51 F.3d 591 (5th Cir. 1995) 16, 17

Duncan v. Gen. Motors Corp.,
300 F.3d 928 (8th Cir. 2002) 15, 23

Ellison v. Brady,
924 F.2d 872 (9th Cir. 1991) 19

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 2, 10-11

Forrest v. Dynamic Sec. Corp.,
2002 WL 1204917 (E.D. La. May 2, 2002) 17

Cited Authorities

Page

Fuller v. City of Oakland,
47 F.3d 1522 (9th Cir. 1995) 25

Gallagher v. Delaney,
139 F.3d 338 (2d Cir. 1998) 17, 22

Galloway v. Gen. Motors Serv. Parts Operations,
78 F.3d 1164 (7th Cir. 1996) 14, 16

Gleason v. Mesirow Fin., Inc.,
118 F.3d 1134 (7th Cir. 1997) 15, 18

Gupta v. Fla. Bd. of Regents,
212 F.3d 571 (11th Cir. 2000) 15, 23

Hardin v. S.C. Johnson & Son, Inc.,
167 F.3d 340 (7th Cir. 1999) 23

Harris v. Forklift Sys., Inc.,
510 U.S. 17 (1993) 7, 10, 22

Hartsell v. Duplex Prods., Inc.,
123 F.3d 766 (4th Cir. 1997) 14, 15, 25

Hathaway v. Runyon,
132 F.3d 1214 (8th Cir. 1997) 18, 22

Indest v. Freeman Decorating, Inc.,
164 F.3d 258 (5th Cir. 1999) 19, 23

Cited Authorities

Page

King v. Hillen,
21 F.3d 1572 (Fed. Cir. 1994) 18

Knabe v. Boury Corp.,
114 F.3d 407 (3d Cir. 1997) 18

Konstantopoulos v. Westvaco Corp.,
112 F.3d 710 (3d Cir. 1997) 22

Little v. Windermere Relocation, Inc.,
301 F.3d 958 (9th Cir. 2002) 23

Mendoza v. Borden, Inc.,
158 F.3d 1171 (11th Cir. 1998),
rev'd, 195 F.3d 1238 (11th Cir. 1999) (en banc) .. 18

Mendoza v. Borden, Inc.,
195 F.3d 1238 (11th Cir. 1999) 23-24

Meritor Sav. Bank v. Vinson,
477 U.S. 57 (1986) 10

Minor v. Ivy Tech State Coll.,
174 F.3d 855 (7th Cir. 1999) 24

Morris v. Oldham County Fiscal Court,
201 F.3d 784 (6th Cir. 2000) 15

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 2, 10

Cited Authorities

Page

Penry v. Fed. Home Loan Bank,
155 F.3d 1257 (10th Cir. 1998) 15

Rogers v. City of Chicago,
320 F.3d 748 (7th Cir. 2003) 24

Shepherd v. Comptroller of Pub. Accounts,
168 F.3d 871 (5th Cir. 1999) 24

Smith v. N.W. Fin. Acceptance, Inc.,
129 F.3d 1408 (10th Cir. 1997) 13

Stacks v. S.W. Bell Yellow Pages, Inc.,
27 F.3d 1316 (8th Cir. 1994) 18

Weller v. Citation Oil & Gas Corp.,
84 F.3d 191 (5th Cir. 1996) 17

Statutes:

28 U.S.C. § 1254(1) (2000) 1

42 U.S.C. § 2000e-2(a) (2000) 1, 10, 12

Page

Other Authorities:

Men, Women, Work and Law: An Even More Dangerous Mixture than Before, Thanks to the Supreme Court, Economist, July 4, 1998 20-21

Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 Notre Dame L. Rev. 437 (2002) 19, 20

John O. McGinnis, *Don't Call High Court Conservative*, Newsday, July 27, 1998 21

Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000) 20

Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277 ..... 13, 14, 18, 22

Robert Sherefkin, *Sexual Harassment Ruling Creates More Uncertainty*, Crain's Det. Bus., Sept. 7, 1998 10

Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992) 20

Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 Geo. L.J. 627 (1997) 20

Cited Authorities

Page

Roy Whitehead, Jr. & Walter Block, *Sexual Harassment in the Workplace: A Property Rights Perspective*, 4 J.L. & Fam. Stud. 229 (2002) . . . 20

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Decided December 19, 2002 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed December 19, 2002 ..... 7a

Appendix C — Order Of The United States District Court For The District Of Arizona Dated March 29, 2001 And Filed March 30, 2001 ..... 15a

Appendix D — Order Of The United States District Court For The District Of Arizona Dated September 26, 1999 And Filed September 28, 1999 ..... 45a

Appendix E — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing And Rehearing En Banc Dated And Filed February 21, 2003 ..... 61a

PETITION FOR A WRIT OF CERTIORARI

Hi-Health Supermart Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals was divided between a published opinion and a jointly filed unpublished memorandum disposition. The opinion is published at 314 F.3d 355 (App. B at 8a), and the memorandum disposition is available at 54 Fed. Appx. 268, 2002 WL 31856113 (App. A at 1a). The decisions of the district court are unreported. (App. C at 15a; App. D at 45a.)

STATEMENT OF JURISDICTION

The court of appeals denied Hi-Health's petition for rehearing on February 21, 2003. (App. E at 61a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

The statute relevant to the questions presented is section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (2000), which provides:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

1. Introduction and Summary

This case presents a factual paradigm that has worried this Court for at least five years. In decision after decision, the Court has reiterated that Title VII does not provide a cause of action for "'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted); *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). While the Court expressed that principle in cases of either egregious behavior or a single joke, it has yet to address a case involving repeated gender-based teasing that was not sexual, vulgar, amorous, haranguing, or accompanied by physical conduct or discrimination in employment terms or opportunities. This is precisely such a case. The Ninth Circuit has failed to apply Title VII consistently with this Court's statements, including the Court's most recent unanimous reversal of the Ninth Circuit's

own unpublished decision in *Clark County School District v. Breeden*, 532 U.S. 268, 270-71 (2001). Beyond that, the Ninth Circuit's decision exposes a fault line in the Title VII case law. The circuits are split both over the threshold level of conduct required for a "hostile environment" claim and over the role of the court in ensuring that jury verdicts satisfy that standard. This case provides a clean factual setting of mere gender-based teasing in which this Court can provide needed guidance.

Title VII is a source of constant litigation. The Ninth Circuit's decision lowers the bar by permitting people to sue based solely on gender-related jokes. At the same time, it highlights the conflict in the courts as to their role in preventing such unnecessary litigation. Moreover, it does so in an important factual context that this Court has not yet considered. It demonstrates the risk that Title VII will become what this Court has repeatedly admonished it must *not* become: a "general civility code" that punishes gender-related jokes or teasing, however annoying or unpleasant a particular plaintiff may find them.

The district court below upheld the jury's verdict for the plaintiff and its award of punitive damages while citing a lack of guidance from the Ninth Circuit. The Ninth Circuit affirmed the judgment without providing any guidance: rather, having ruled on the constitutionality of the statutory damages cap issue in a published opinion, the court relegated its ruling on the application of Title VII to an unpublished memorandum. Now it is up to this Court to provide the needed guidance. This case raises issues that cannot be swept under the judicial rug. They must be squarely confronted so that this Court can provide necessary guidance to the lower courts.

2. Background of the Case

Hi-Health Supermart Corporation is an Arizona-based company that owns about 50 retail stores in the Phoenix metropolitan area that sell health products, including groceries, food, books, and vitamins. Hi-Health was founded in the 1970s by Sy Chalpin, who remains the President and owner of the company. Chalpin is a short, elderly, gregarious New Yorker who typically uses his old-school brand of humor to motivate or inspire others.

While Chalpin is old-school in some ways, his company's employment policies are not. Hi-Health's workforce of over 300 is predominantly female, and, during the relevant period, most of Hi-Health's senior managers were women. Those managers included the warehouse manager, customer sales manager, training manager, human resources director, and plaintiff Jill Lansdale, who was the general merchandise manager. There is no evidence that Chalpin ever sought to limit or impair the performance of women in his company; to the contrary, he hired and promoted them, and encouraged their progress.

Chalpin personally interviewed and hired Lansdale in October 1996 to be Hi-Health's general merchandise manager. Though he had initially placed her in a six-month probationary period at a buyer's annual salary of $45,000, he promoted her several months early, and on December 1, 1996, she officially became general merchandise manager, with an annual salary of $80,000. (Trial Transcript ("Tr.") at 312, 314-15.) Lansdale worked in that position until June 1997, when she was terminated for performance-related reasons. The district court granted, and the court of appeals affirmed, summary judgment for Hi-Health on Lansdale's

claim of wrongful termination, and the circumstances of her discharge were not at issue in the trial of her Title VII claim.

The sum and substance of Lansdale's Title VII "hostile environment" claim is that Chalpin made gender-related remarks. She admitted that, while she worked for Hi-Health, she "*suffered no other form of gender discrimination . . . aside from the comments*." (Tr. at 312, emphasis added.) She did not allege that Chalpin ever discriminated against her or any other women in salary, benefits, responsibilities, or opportunities for advancement.

Chalpin's comments, which were listed by the district court in its order denying JMOL, may have been gender-related or sexist, but they were never more than banter. (App. C at 18a-20a.) The only specific circumstance Lansdale described was one occasion in November 1996 on which Chalpin commented to her and her acquaintance that "Hi-Health was a slow-moving company because they had a woman in charge of merchandising, which was myself." (*Id.* at 19a; Tr. at 243-44, 246, 316, 521-24.) Lansdale admitted that Chalpin "might have said it lightly," and "it crossed my mind he could have been kidding" or "joking." (Tr. at 247, 316, 317-18.) Indeed, it was well known even to Lansdale's acquaintance that the company was "growing fast," not "slow-moving," and Lansdale, who had been hired only the month before, was promoted to general merchandise manager (with a doubling of her salary) shortly after Chalpin made that comment. (*Id.* at 314-15, 431-32, 438.)

Lansdale claimed that Chalpin made other comments in a similar way. Chalpin purportedly urged her, "think with the logic of a man," and, "Forget you're a woman when you negotiate for Hi-Health." (*Id.* at 236, 330.) Lansdale also testified that Chalpin commented that "I was slow because I

was a woman," (*id.* at 246), that "women were slower than men" (*id.* at 252), and that "men were smarter than women." (*Id.* at 255.) Lansdale also testified that Chalpin *once* said to her, "That's a comment that only a woman would make." (*Id.* at 262.)

The other teasing comments by Chalpin that Lansdale alleged were even more innocuous. She testified that Chalpin had remarked that her widely-known diet appeared successful because she "was slimming up quite nicely," a compliment that Lansdale admitted was unaccompanied by any "demeaning behavior." (*Id.* at 271, 345, 346.) She testified that Chalpin *twice* made tame jokes about attractive women depicted in an advertisement or stock photograph. (*Id.* at 274, 348-50.) She claimed that he had once teased that "I got where I was because of my looks, or I got where I was because of my looks and my body." (*Id.* at 270.) On another occasion, when Lansdale had purportedly worked so hard over an Easter weekend that her husband was unhappy with her, Chalpin joked, "So are you telling me you're available now?" (*Id.* at 277.) Chalpin had never asked about her marriage on any other occasion, and Lansdale reported that when they were on overnight business trips, Chalpin behaved appropriately and did not "come on" to her in any way. (*Id.* at 352-53.)

The female witnesses who testified about Chalpin's periodic gender-related comments in the workplace testified that they *knew he was joking*. They corroborated Chalpin's testimony that his often-ironic sense of humor was not intended to be taken personally or maliciously.[1] There was

1. (*See* Tr. at 652, 657, 668, 686-87 (Christine Dworkin); *id.* at 760, 762-63, 787-88 (Carol Norwalk); *id.* at 884, 891, 893 (Brenda Nitchen); *id.* at 1241-44 (Kory Shaw); *id.* at 1393 (Donna Rider); *id.* at 1411 (Mary Ann Dougherty).)

no yelling or "physically threatening or humiliating" behavior, but rather at most "a mere offensive utterance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). The jury was allowed to hear that Chalpin had, on occasion, commented about "women drivers" and made "blonde jokes."

There was no evidence that Chalpin's attempts at humor, however clumsy, interfered with his female employees' job performance. Lansdale herself repeatedly testified in her deposition and at trial that Chalpin's remarks did not unreasonably interfere with her performance which, in her view, remained at a "very high level." (9th Cir. Supp. Excerpts of Record 47, ¶ 42; Tr. at 357-58.) Moreover, Hi-Health buyer Christine Dworkin testified that, in 1996 and 1997, when she worked closely with Chalpin and Lansdale, they appeared to relate "cordially" and "professionally" with one another. (Tr. at 688-89.) And buyer Carol Norwalk testified that "in meetings, [Lansdale] and [Chalpin] had some good conversations where I felt he respected her." (*Id.* at 776.)

In sum, Chalpin's remarks were not vulgar, profane, or graphic. They were not made in a threatening or even haranguing manner. There were no sexual or amorous overtures. There was no improper touching, crowding, or other physical acts. Lansdale never suggested that Chalpin was trying to be hostile, to drive her or women in general from the workforce, to interfere with her job performance, or to inflict emotional distress. Chalpin's arguable transgression was that sometimes Lansdale did not find his comments as funny or endearingly old-fashioned as he intended.

Before sending the case to the jury, the district court denied Hi-Health's motion for summary judgment, though

the court found that "it does not appear that the offensive conduct occurred daily or even weekly." (App. D at 55a.) Lansdale did not herself quantify the number of occasions on which she heard gender-related comments. Other female employees testified, for example, that they only *once* heard Chalpin refer to men being smarter than women (Tr. at 762, 931), or *once* heard him use "broad" to refer to a woman (*id.* at 684, 827).

3. Proceedings Below

a. District Court

Lansdale's Title VII claim was tried to a jury in the district court, and the jury returned a verdict of $100,000 in compensatory damages and $1 million in punitive damages. In its post-trial order, the district court conformed the verdict to the $200,000 statutory damages cap under Title VII for an employer the size of Hi-Health.

As to liability, the court observed that "[t]he evidence adduced at trial in this case is on the borderline of culpable conduct under Title VII." However, the trial court declined to grant judgment as a matter of law "in the absence of more explicit guidance from the Ninth Circuit. . . ." (App. C at 21a.) Indeed, in its earlier ruling on summary judgment, the district court found that Chalpin's "remarks, taken individually, cannot be said to reasonably constitute harassment or to create a hostile environment." (App. D at 54a.)

b. Court of Appeals

On Lansdale's appeal and Hi-Health's cross-appeal from the amended judgment, the Ninth Circuit affirmed in two separate but jointly filed decisions, one published and one

unpublished. In the published opinion, the court upheld the constitutionality of the statutory damages cap. (App. B.) The court addressed whether Hi-Health had violated Title VII in the unpublished memorandum, despite the district court's plea for guidance on that issue. The court briefly stated that

> the jury could, indeed, determine that Chalpin's repeated statements were severe and pervasive enough to alter the conditions of Lansdale's employment and render the environment hostile and abusive. Certainly a jury could decide that a reasonable woman would find it so. Lansdale did.

(App. A at 2a-3a, citations and footnote omitted.)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Has Failed to Confine Title VII to the Bounds Set by this Court's Decisions.

This case illustrates how far astray a court of appeals may go from the original goals of Title VII. In the absence of discriminatory employment actions, physical touching, sexual propositions, or threatening behavior, the Ninth Circuit found a violation of Title VII based on mere speech. Indeed, it based its judgment on speech that was not vulgar or even intended as hostile, even if the humor embodied in it was dated and offensive.

The text of Title VII itself sets no specific standard for hostile environment cases; the doctrine is judge-made. The statute only generally bars an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of

employment." 42 U.S.C. § 2000e-2(a)(1) (2000). By two key decisions, the Court unmoored sexual harassment law from two anchors: money and tangible psychological effect on the plaintiff. In 1986, the Court held that Title VII forbids not only quid pro quo harassment, but also "hostile environment" harassment that does not affect the plaintiff's economic benefits. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). Then, in 1993, the Court held that, to be actionable, the hostile environment need not "seriously affect [an employee's] psychological well-being" or lead her to "'suffer injury,'" *e.g.*, cause "a nervous breakdown" or other "concrete psychological harm." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (citation omitted). Instead, the environment need only be one that the plaintiff subjectively perceived as "abusive" and that an objective reasonable person would also find hostile and abusive. *Id.* at 21-22.

It soon became clear that Title VII might drift into becoming a workplace civility code, spurring more litigation over frivolous complaints or minor grievances and "further complicat[ing] a workplace already confused about male-female relations."[2] This Court took steps to keep the statute in check, but its opportunities to do so came in cases that involved either multiple egregious acts of overtly sexual conduct or, by contrast, a single naughty joke. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), involved same-sex harassment that included sexual assault, battery, and threats of rape. The Court admonished that lower courts must "distinguish between simple teasing . . . and conduct which a reasonable person . . . would find severely hostile or abusive." *Id.* at 81-82. That same year, *Faragher*

2. Robert Sherefkin, *Sexual Harassment Ruling Creates More Uncertainty*, Crain's Det. Bus., Sept. 7, 1998, at 12.

v. City of Boca Raton, 524 U.S. 775 (1998), involved repeated and uninvited offensive touching, threatening sexual requests, and sexual comments and gestures to a female lifeguard by two male superiors. The Court cautioned against allowing Title VII to become a "general civility code," and emphasized the need to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Id.* at 788 (citations omitted). The Court reiterated, "We have made it clear that conduct must be *extreme* to amount to a change in the terms and conditions of employment. . . ." *Id.* (emphasis added).

Then, in *Clark County School District v. Breeden*, 532 U.S. 268 (2001), this Court unanimously reversed the Ninth Circuit's unpublished decision reinstating a Title VII hostile environment suit based on a single joke by colleagues: in reviewing job applications, a male supervisor read out loud a sexual comment the job-seeker had once made to a co-worker, and remarked that he did not know what the comment meant. The other male employee replied, "Well, I'll tell you later," and the two men chuckled. *Id.* at 269. The Court admonished that, "[j]ust three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is 'so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment."'" *Id.* at 270 (citations omitted). As this Court explained, "'a recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."'" *Id.* at 271 (quoting *Faragher*, 532 U.S. at 788). The Court reaffirmed that "'whether an environment

is sufficiently hostile or abusive' must be judged 'by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."'" *Id.* (quotations omitted).

Despite the admonitions from this Court, the Ninth Circuit has returned to its view that gender-related jokes are sufficient to create a hostile working environment. While the impact of this Court's *Clark County* decision was fully briefed below, the Ninth Circuit did not cite it in its ruling on the sexual harassment claim.[3] The court of appeals' principle seems to be that even though the single joke in *Clark County* was not enough, several of them over a period of almost a year were sufficient to state a claim. The panel clearly did not abide by this Court's repeated statements that gender-related banter does not violate Title VII. The conduct alleged in this case is far afield from the paradigm of discrimination based on sex in "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), and this Court should once again illuminate the proper bounds of the statute's proscriptions.

---

3. The court of appeals cited *Clark County* only for an unrelated proposition related to causation in affirming summary judgment for Hi-Health on Lansdale's retaliatory discharge claim. (App. A at 5a.)

II. The Circuits Are in Conflict As to the Whether the Conduct at Issue Can Give Rise to a Hostile Working Environment.

A. The Circuits Are Split on Whether There is a "Safe Harbor" for Gender-Related Teasing.

The courts of appeals are divided on the critical issue raised by this case: whether gender-relating teasing can create a hostile environment that constitutes sexual harassment under Title VII. "[T]here are differing views among the circuits about what constitutes a hostile work environment." *Smith v. N.W. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1415 n.3 (10th Cir. 1997). As Professor Eric Schnapper has noted, the courts are "sharply divided" on the distinction between "mere offensive utterances" and discriminatory sexual harassment, with the Fourth, Fifth, Sixth, and Seventh Circuits adopting a more constrained view of "hostile environment" claims in "stark contrast" to that of the Ninth and other circuits.[4] As a result, "harassment patterns and tactics that are clearly unlawful in much of the country are practically immune from attack" in other circuits. *Id.* at 282. A district court recently granted summary judgment for the employer on a hostile environment claim based on a lengthy "laundry list" of sexist and sexual comments and physical touching, but noted that, "[a]dmittedly, this case might make the grade in some jurisdictions." *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1379, 1381 (S.D. Ga. 2001). This is intolerable for a statute of national application that applies in each and every place of employment across the country.

---

4. Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. Chi. Legal F. 277, 281-82, 309.

Some circuits have "created a safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex." *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (Posner, J.). Under this view, "[p]ractices which do not reach the requisite 'level of offensiveness' . . . cannot as a matter of law provide a basis for a Title VII claim . . . regardless of how often they occur." Schnapper, *supra*, at 310. The typical elements of the paradigmatic case of sexual harassment are "sexual assaults . . . uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), and a claim that is "far from the paradigmatic case of sexual harassment" is not actionable. *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 (4th Cir. 1997).

The seminal decision for this view is *Baskerville*, in which the Seventh Circuit overturned a jury verdict based on a hostile environment claim where the alleged harasser had made a gesture "intended to suggest masturbation," made a grunting sound that sounded like "um um um" when the plaintiff walked by, commented that it got "hot" when she entered his office, and told her that one company announcement meant "[a]ll pretty girls run around naked"—conduct far more egregious than occurred in this case. 50 F.3d at 430-31. Writing for the court, Judge Posner noted that the alleged perpetrator was not a "sexual harasser," but merely "a man whose sense of humor took final shape in adolescence." *Id.* at 431.

> It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman

> mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the supervisor's] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.

Id. at 432.

"The central teaching of the *Baskerville* opinion [is] that 'low-level harassment' is not actionable." *Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) (Coffey, J.). Instead, "[t]he concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women," and requires a distinction between "a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other." *Baskerville*, 50 F.3d at 430, 431.[5] Several appellate courts have warned against decisions that "lower the bar of Title VII to punish mere bothersome and uncomfortable conduct," which "would 'trivialize true instances of sexual harassment.'" *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 586 (11th Cir. 2000).[6]

---

5. *See also Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934-35 (8th Cir. 2002) (recognizing that "the high threshold of actionable harm" is not met by conduct that was merely "boorish, chauvinistic and decidedly immature"); *Penry v. Fed. Home Loan Bank*, 155 F.3d 1257, 1263 (10th Cir. 1998) (though "plaintiffs worked in an unpleasant environment," it was not "permeated with discriminatory intimidation"); *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 (4th Cir. 1997) ("allowing [plaintiff's] claim to go to trial would countenance a federal cause of action for mere unpleasantness").

6. *See also Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 790 (6th Cir. 2000) (county engineer's repeated dirty jokes, (Cont'd)

Other circuits have followed this safe harbor view in cases of "gender slur" as well as "sexual innuendo." *Galloway*, 78 F.3d at 1168. The Fifth Circuit's decision in *DeAngelis v. El Paso Municipal Police Officers Association*, 51 F.3d 591, 593 (5th Cir. 1995), demonstrates the patent conflict with the Ninth Circuit's standard in this case. In *DeAngelis*, the Fifth Circuit reversed a judgment for a female police officer who claimed that repeated columns in a police officer association newsletter over thirty months satirized the plaintiff, the first female sergeant in the El Paso force, and created a hostile environment. The columns made fun of women being in the workplace, referring to the plaintiff as a "dingy woman," recalling "the good ol' days when finding the criminal was more important to the patrolmen than keeping your hair in place," and expressing a desire for "a female officer that places her ability before her gender." *Id.* at 594-95. Writing for a unanimous panel, Judge Edith Jones held that the columns did not create a hostile environment because they "did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity perpetuated by co-workers." *Id.* at 595. To the contrary, the columns "attempted clumsy, earthy humor," and their author "intended to be a curmudgeon, the police department's Archie Bunker or Homer Simpson," and "[m]isogyny naturally came with [his] territory." *Id.* The court noted that "much of his humor lacked volatility" and "hardly rank in the firmament of sexist vilification." *Id.*[7]

(Cont'd)
verbal sexual advance, reference to plaintiff as "Hot Lips," and comments about her state of dress "seems to have consisted of the kind of simple teasing, offhand comments, and isolated incidents that *Faragher* made clear did not amount to discriminatory changes in the terms and conditions of a plaintiff's employment").

7. *See also Buckner v. Gen. Signal Tech. Corp.*, 163 F. Supp. (Cont'd)

The Fifth Circuit's standard echoes that of the Seventh Circuit. "A claim for a sexually hostile working environment is not a trivial matter," and "embodies . . . conduct so egregious as to . . . destroy [women's] equal opportunity in the workplace. . . . [A] less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence" and "would mandate not equality but preference for women." *Id.* at 593; *see also Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996) (Title VII does not apply to "everyday insults," or to the type of harassment which "does not hinder a female employee's performance").

The Ninth Circuit's decision below indicates the circuit's continuing adherence to a more expansive view of Title VII that recognizes no "safe harbor" for workplace teasing or humor, however gender-related, and that produced the memorandum decision that this Court reversed in *Clark County*. Nor is the Ninth Circuit alone. In *Gallagher v. Delaney*, the Second Circuit held that frequent gifts, compliments, and lunch invitations were sufficient to give rise to a Title VII claim, even without any off-color remarks. 139 F.3d 338, 343-44 (2d Cir. 1998). These circuits do not require "hellish" circumstances that interfere with the

---

(Cont'd)

2d 617, 624 (W.D.N.C. 2000) (granting summary judgment to employer because "[c]ertainly, sexist banter which the recipient did not know whether to take seriously was not 'severe,'" even though "it reflected an archaic attitude . . . indicative of a person who is out of touch with social and legal norms"); *Forrest v. Dynamic Sec. Corp.*, 2002 WL 1204917, at *12 (E.D. La. May 2, 2002) (granting JMOL to employer because "a few jokes [by a higher-level supervisor] that were derogatory towards women . . . is insufficient as a matter of law to show the existence of a hostile work environment").

plaintiff's job performance, but only that the altered conditions created by the harassment be disadvantageous to the plaintiff in some sense.[8]

B. The Circuits Are Divided on the Underlying Purpose of Title VII.

The circuit split on the standard for hostile conduct reflects an underlying conflict on the purpose of Title VII. *See* Schnapper, *supra*, at 293-94 (citing cases). For example, the Seventh Circuit has noted that Title VII was not intended to address all sexist conduct, because "vulgar banter, tinged with sexual innuendo is inevitable in the modern workplace, particularly from 'coarse and boorish workers.'" *Gleason*, 118 F.3d at 1144 (citation omitted).

By contrast, the decision of the Ninth Circuit panel below (which including a visiting Third Circuit judge) reflected a more activist agenda that both of those circuits have endorsed:

> Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage

---

8. *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1410 (10th Cir. 1997) (race discrimination case); *Mendoza v. Borden, Inc.*, 158 F.3d 1171, 1175 (11th Cir. 1998), *rev'd on other grounds*, 195 F.3d 1238 (11th Cir. 1999) (en banc); *King v. Hillen*, 21 F.3d 1572, 1583 (Fed. Cir. 1994); *Knabe v. Boury Corp.*, 114 F.3d 407, 410 (3d Cir. 1997); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3d Cir. 1996).

> employment opportunities for women." . . . We hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.

Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)). The Ninth Circuit panel below expressly relied on *Ellison*. (App. A at 3a n.2.)

These contrary perspectives on the goal of the statute produce disparate results when the conduct at issue is less than egregious and more than one isolated, tame joke. As one court recently observed, "[a]ll of the sexual hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, longlasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999). That is why this case offers an important factual setting closer to the "borderline" in which to establish the limits of Title VII.

This is a critical conflict for the Court to resolve. The development of Title VII case law has left an "expansive wasteland between actionable harassment and merely unpleasant teasing."[9] "'Severe,' 'pervasive,' 'hostile,' and

---

9. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 Notre Dame L. Rev. 437, 491 (2002).

'abusive' are mushy terms,"[10] and determining the intensity or quantity of conduct needed to constitute a hostile environment "is now no less difficult than 'trying to nail a jellyfish to the wall.'" *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1377 (S.D. Ga. 2001) (quotation omitted). This is a particularly difficult problem where the alleged remarks would not violate Title VII if made once or twice, but the plaintiff asserts that they were made with sufficient frequency to create a hostile environment. "'[I]t is often impossible for a supervisor or employer to know in advance whether or not offensive conduct is illegal, because of the amorphousness of the legal definitions of harassment itself.'"[11] The ineluctable result of this state of affairs is overcorrection of lawful speech and behavior: "The employer's natural response, given that he does not even know exactly what the terms [of the legal test] mean, is to avoid possible liability, and will likely cause him to 'shut the employees up,'" thus suppressing protected speech.[12]

---

10. Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 Geo. L.J. 627, 634 (1997).

11. Frank, *supra*, at 491 (quoting Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 82-83 (2000)).

12. Roy Whitehead, Jr. & Walter Block, *Sexual Harassment in the Workplace: A Property Rights Perspective*, 4 J.L. & Fam. Stud. 229, 236 (2002). "Vagueness leads people 'to "steer far wider of the unlawful zone," than if the boundaries of the forbidden areas were clearly marked.'" Volokh, *supra*, at 636 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). *See also* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1802 n.54 (1992); *Men, Women, Work and Law: An Even More Dangerous Mixture than Before, Thanks to the Supreme Court*, Economist, July

(Cont'd)

Whether jokes or stray comments about gender can, standing alone, be considered unlawful is a matter that lawyers and nonlawyers alike have long debated, whether in courtrooms, boardrooms, or living rooms. This Court addressed the "one joke" setting in *Clark County*, and repeated sexual or threatening behavior in other cases. This case presents an intermediate context of repeated but nonsexual and nonthreatening comments devoid of any alleged touching, amorous overtures, or discriminatory employment actions. It is therefore provides an excellent vehicle for resolving the differing views as to Title VII's application to what is common workplace behavior. Without this Court's intercession, Title VII's standards will remain intolerably vague and and will continue to have a confusing and polarizing effect on ordinary social interaction.

III. The Circuits Are in Conflict as to Whether the Existence of a Hostile Environment Is a Question of Law or Fact.

The Ninth Circuit's decision upholding the jury verdict raises a second conflict among the circuits: whether the existence of a hostile working environment is a question of fact, a question of law, or some combination of the two.

(Cont'd)
4, 1998, at 12, 21 (Title VII had "already forced employers to engage in mass censorship of employee speech," and decisions "may create more rather than less confusion" and "put even more pressure on them to do this"); John O. McGinnis, *Don't Call High Court Conservative*, Newsday, July 27, 1998, at A27 (expansive application of Title VII will "impose costs on businesses and social rigidities on everyone else" because, "[i]n order to avoid lawsuits, companies . . . will react by creating inflexible, overbroad codes that are likely to chill much social behavior that does not constitute harassment.").

Courts and commentators have noted the circuit conflict on this issue. *See, e.g.*, *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 716 n.1 (3d Cir. 1997) ("the courts of appeals are divided"); Schnapper, *supra*, at 298 (noting "a clear division among the circuits"). The conflict on this point is crucial: it determines whether and to what extent the court will restrain juries from overrunning the proper bounds of Title VII by granting JMOL.

On one hand, some circuits view the issue as essentially factual, requiring extreme deference to the jury and review for clear error.[13] The Eighth Circuit has opined, "There is no bright line between sexual harassment and merely unpleasant conduct so a jury's decision must generally stand unless there is trial error." *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997). This validates the prediction that Title VII case law would leave "virtually unguided juries [to] decide whether sex-related conduct . . . is egregious enough to warrant an award of damages." *Harris*, 510 U.S. at 24 (Scalia, J., concurring).

On the other hand, "[o]ther circuits take an entirely different approach" and rely on "judge-made determinations of whether or not . . . a given set of circumstances create a hostile work environment." Schnapper, *supra*, at 301

---

13. *See, e.g.*, *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) ("A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations."); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1130-31 (4th Cir. 1995) ("Whether harassment is sufficiently severe or pervasive to create an abusive work environment is 'quintessentially a question of fact.'") (citations omitted); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 835-36 (6th Cir. 1996) (same; quoting *Amirmokri*).

(collecting citations).[14] These circuits recognize that a defendant's failure to pay proper homage to appropriate social mores and political correctness can easily result in an aroused jury refusing to distinguish between the dictates of good manners and the requirements of law, and that "[m]otions for judgment as a matter of law can police the baseline for hostile environment claims." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 n.8 (5th Cir. 1999).

Thus, other circuits have deemed it appropriate to overturn jury verdicts and grant JMOL to the defendant where the misconduct did not rise to the level of a Title VII violation, even though it was far more egregious than Chalpin's gender teasing. *See, e.g.*, *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002) (overturning jury verdict for female employee who was subjected to inappropriate behavior by a supervisor, including crude, rude, and lewd jokes and teasing, as well as overtures and unwanted touching); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 579 (11th Cir. 2000) (overturning verdict and entering JMOL where purported harasser improperly touched plaintiff on knee and thigh, lifted the hem of her dress, and told her "You are looking very beautiful" and that he would have spent the night with her during a storm); *Mendoza v. Borden, Inc.*, 195 F.3d 1238,

14. *See, e.g.*, *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999) ("Whether such [a hostile] environment exists is a question of law."); *see also Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002) ("[W]hether the plaintiff has established that she or he was subjected to a hostile work environment . . . present[s] mixed questions of law and fact that we review de novo.") (citations omitted); *Barbour v. Browner*, 181 F.3d 1342, 1348 (D.C. Cir. 1999) ("Whether the harassment in a particular case can be considered 'severe or pervasive' is manifestly a mixed question of law and fact[.]")

1243 (11th Cir. 1999) (en banc) (affirming JMOL for defendant where harasser looked plaintiff up and down, followed her, said he was "getting fired up," and rubbed his hip against hers); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (vacating plaintiff's jury verdict where, for example, over a four-month period, the alleged harasser looked plaintiff up and down, and made sexual jokes); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (reversing plaintiff's jury verdict and entering JMOL for employer where supervisor's conduct included masturbation gestures, grunting at women, and suggesting that "pretty girls" should "run around naked").[15] The panel's decision cannot be squared with this precedent.

---

15. Other courts have also approved summary judgment or dismissal to bring an end to cases that fall below the Title VII threshold. *E.g.*, *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003) (affirming summary judgment because coworker's repeated profession of love and other conduct were not indicative of "a sexual predator" and, "however inappropriate, [were] not sufficiently severe or pervasive to satisfy the high threshold for actionable harm"); *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003) (affirming summary judgment because police sergeant's sexual jokes about plaintiff's breasts and her need for a boyfriend and other conduct were insufficient to create a hostile environment); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir. 2000) (affirming dismissal of employee's claim where supervisor touched and grabbed the plaintiff several times (both sexually and non-sexually) and often made advances); *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874-75 (5th Cir. 1999) (affirming summary judgment because each of coworker's sexual comments was "the equivalent of a mere utterance of an epithet than engender[s] offensive feelings" and none of actions "physically threatened" plaintiff or "undermine[d] Shepherd's workplace competence"); *Minor v. Ivy Tech State Coll.*, 174 F.3d 855, 857 (7th Cir. 1999) (affirming summary judgment for employer where

(Cont'd)

In this case, the district court declined to grant JMOL to Hi-Health "in the absence of more explicit guidance from the Ninth Circuit, and in light of the highly fact-specific inquiry at issue." (App. C at 21a.) The Ninth Circuit provided no guidance at all, other than to emphasize the right of the jury to find that Chalpin's statements were severe and pervasive enough. (App. A at 2a-3a.) Though the Ninth Circuit had previously held (in reversing the district court's decision in favor of a *defendant*) that "whether the conduct . . . was sufficiently severe and pervasive to constitute sexual harassment is a question of law,"[16] the panel's failure to give any *legal* analysis in response to the district court's request for guidance, and its summary emphasis on the jury's right to find a hostile environment, puts it squarely with those circuits who follow the question-of-fact approach because of the "'fact-intensive' nature of the determination of whether a work environment is hostile." *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1109 (8th Cir. 1998). This Court must bring uniformity to the circuits by clarifying the proper roles of judge and jury in determining whether a hostile environment existed.

(Cont'd)

supervisor flirted with plaintiff, put his arms around her, and kissed and squeezed her); *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997) (affirming summary judgment despite comment by supervisor that he had "made every female in this office cry like a baby," statement that plaintiff was one of the "little people" or a "slave," and demeaning and insulting gender-related jokes and comments that were standard in the office).

16. *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHARLES G. COLE
Counsel of Record
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

LAWRENCE ALLEN KATZ
BENNETT EVAN COOPER
STEPTOE & JOHNSON LLP
Collier Center
201 East Washington Street
Suite 1600
Phoenix, AZ 85253
(602) 257-5200

Counsel for Petitioner

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED DECEMBER 19, 2002

United States Court of Appeals,
Ninth Circuit

D.C. No. CV-97-02555-RGS

No. 01-16017

Jill LANSDALE,

Plaintiff-Appellant,

v.

HI-HEALTH SUPERMART CORPORATION,

Defendant-Appellee.

No. 01-16018

Jill Lansdale,

Plaintiff-Appellee,

v.

Hi-Health Supermart Corporation,

Defendant-Appellant.

Appendix A

Argued and Submitted Nov. 6, 2002

Decided Dec. 19, 2002

Before *STAPLETON*,* O'SCANNLAIN, and *FERNANDEZ*, Circuit Judges.

MEMORANDUM**

Hi-Health Supermart Corp. appeals the judgment entered against it for discriminating against Jill Lansdale on account of her gender. *See* 42 U.S.C. § 2000e-2(a) (Title VII). Lansdale appeals the grant of a partial summary judgment against her, and the denial of attorney's fees.[1] We affirm.

(1) Hi-Health first asserts that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 50. It asserts that the barrage of gender denigrating comments that issued from its owner and president, Simon Chalpin, was not sufficient to allow a jury to find that Lansdale's working environment was hostile in the Title VII sense. We disagree. From the evidence submitted, the jury could, indeed, determine that

---

* The Honorable Walter K. Stapleton, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1. Lansdale also asserts that the limitation on damages in 42 U.S.C. § 1981 a is unconstitutional. We address that issue in a published opinion filed this date.

Chalpin's repeated statements were severe and pervasive enough to alter the conditions of Lansdale's employment and render the environment hostile and abusive. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993); *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir.2000); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir.1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir.1994). Certainly a jury could decide that a reasonable woman would find it so.[2] Lansdale did.

(2) Hi-Health also asserts that it is entitled to a new trial because the district court erred in a number of ways. *See* Fed.R.Civ.P. 59. The first way it points to is in the seating of the jury. The district court granted Lansdale's motion pursuant to *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986), and, thus, refused to allow Hi- Health to exercise a preemptory challenge against one woman juror, although it did allow challenges to two other women jurors. Hi-Health did offer its "neutral" explanation for the challenge. Even though the explanation was plausible, the district court did not have to accept it. Here it chose not to do so. *See Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995); *Hernandez v. New York*, 500 U.S. 352, 361-64, 111 S.Ct. 1859, 1867-69, 114 L.Ed.2d 395 (1991); *McClain v. Prunty*, 217 F.3d 1209, 1220-21 (9th Cir.2000). We owe the district court a great deal of deference. *See United States v. Collins*, 90 F.3d 1420, 1430 (9th Cir.1996); *United States v. Lorenzo*, 995 F.2d 1448, 1455 (9th Cir.1993). We are unable to say that it abused its discretion here.

---

2. *See Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir.1991).

Hi-Health also seeks a new trial on a myriad of other grounds. It suggests that the issue of punitive damages should not have gone to the jury because it could not be said that Chalpin acted with malice or with reckless indifference to Lansdale's Title VII rights. *See* 42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535-36, 119 S.Ct. 2118, 2124-25, 144 L.Ed.2d 494 (1999); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir.2000). We disagree. The jury could find that Chalpin was well aware of the fact that under Title VII he could not discriminate against a woman on account of her gender, and that his claim that he could nevertheless belittle and denigrate women on that basis was recklessly indifferent to his legal obligations. His assertion that there is something novel in the concept that humiliating and verbally abusing women on account of their gender violates Title VII is not even minimally persuasive. *See Steiner*, 25 F.3d at 1463; *see also Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir.2000); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537, 1539 (10th Cir. 1995); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 905 (1st Cir.1988).

Also, we see no reversible error in the district court's admission of certain other acts against women other than Lansdale. Those acts were relevant to show Chalpin's pattern of conduct, which created an abusive atmosphere as to women in general, and his at least reckless indifference to his effect upon them. *See Heyne v. Caruso*, 69 F.3d 1475, 1479-80 (9th Cir.1995); *see also Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 n. 3 (9th Cir.2001); *Passantino*,

212 F.3d at 516. Admission of the evidence was within the district court's discretion.[3] *See Tennison*, 244 F.3d at 688.

Likewise, the district court did not abuse its discretion when it denied a new trial based upon misconduct by Lansdale's attorney. *See Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir.1984).

(3) Lansdale appeals the grant of a summary judgment against her on her claim of retaliation. However, we agree with the district court that she did not place that claim before the Equal Employment Opportunity Commission, and, therefore, cannot pursue it here. *See Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729-30 (9th Cir.1984); *see also Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 689 (7th Cir.2001). Of course, we are cognizant of the fact that a claim which is sufficiently related to the claim filed may be considered by us. *See EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir.1994); *Green v. Los Angeles County Superintendent of Sch.*, 883 F.2d 1472, 1475-76 (9th Cir.1989). We agree with the district court that Lansdale's retaliation claim is not in that category. In any event, we also agree that she did not submit sufficient evidence of retaliation to enable her to avoid summary judgment. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509 (2001); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir.1982).

---

3. In addition, given all of the circumstances, the district court did not abuse its discretion when it allowed testimony by a witness who had not previously been disclosed. *See Bunch v. United States*, 680 F.2d 1271, 1280 (9th Cir.1982).

(4) Lansdale's final argument is that the district court abused its discretion when it denied her attorney's fees because she failed to file her motion therefor in a timely fashion, that is within 14 days after entry of judgment. We disagree. Lansdale violated both national and local rules of civil procedure. *See* Fed.R.Civ.P. 54(d)(2)(B); Dist. of Ariz. Loc. R. of Prac. 2.20; *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 889-90 (9th Cir.2000). That was a sufficient reason to deny the fee motion. *Id.*

AFFIRMED. The parties shall bear their own costs on appeal.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED DECEMBER 19, 2002

United States Court of Appeals,
Ninth Circuit

D.C. No. CV-97-02555-RGS

No. 01-16017

Jill LANSDALE,

Plaintiff-Appellant,

v.

HI-HEALTH SUPERMART CORPORATION,

Defendant-Appellee.

No. 01-16018

Jill Lansdale,

Plaintiff-Appellee,

v.

Hi-Health Supermart Corporation,

Defendant-Appellant.

Appendix B

Argued and Submitted Nov. 6, 2002

Filed Dec. 19, 2002

Before *STAPLETON*,* O'SCANNLAIN, and *FERNANDEZ*, Circuit Judges.

OPINION

FERNANDEZ, Circuit Judge.

Jill Lansdale obtained a verdict against Hi-Health Supermart Corp. for gender discrimination. *See* 42 U.S.C. § 2000e-2(a) (Title VII). She appeals the limitation of her damages pursuant to 42 U.S.C. § 1981a and asserts that the statute is unconstitutional.[1] We affirm.

BACKGROUND

After she was terminated from Hi-Health, Lansdale brought this action and claimed that Hi-Health, through its owner and president, discriminated against her by establishing a hostile environment based upon her gender. The jury agreed and awarded damages of $100,000 for pain and suffering, mental anguish, shock and discomfort, plus $1,000,000 in punitive damages.

---

* The Honorable Walter K. Stapleton, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1. Lansdale asserts a number of other claims and Hi-Health also appeals and asserts additional claims on its own behalf. We address all of those claims in an unpublished memorandum disposition filed this date.

The district court then applied the limitation in 42 U.S.C. § 1981a and reduced the damage award to $200,000. Lansdale claims that the statutory limitation is unconstitutional and, therefore, appeals from the district court's reduction of the jury award.

STANDARD OF REVIEW

We review the constitutionality of the statute limiting damages de novo. *See Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir.1993). We would only invalidate the statute for "the most compelling constitutional reasons." *Id.* (internal quotation marks and citations omitted).

DISCUSSION

Lansdale's argument that Congress violated the United States Constitution when it placed a damage cap on Title VII recoveries is presented with great vigor, but lacks virtue. Until it enacted 42 U.S.C. § 1981a as a part of the Civil Rights Act of 1991, no future-looking damages or punitive damages whatsoever were available to those who asserted Title VII claims, regardless of whether those claims were based upon race, color, religion, sex, or national origin. However, damages were available in actions under 42 U.S.C. § 1981 for those who could show that they were denied rights "enjoyed by white citizens." In 1991, Congress decided to grant damages to those whose Title VII rights were violated, but it limited (capped) the amount that could be obtained. For employers like Hi-Health, "[t]he sum of the amount of compensatory damages awarded . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary

losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party . . . $200,000." *See* 42 U.S.C. § 1981a(b)(3)(C).

Understandably, many plaintiffs were not satisfied with that partial remedy; they wanted to, and were sure they could, recover much more. Thus, they, like Lansdale, challenged the limitation on constitutional grounds.

We have had occasion to consider and reject some of those challenges. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1200-02 (9th Cir.2002). In so doing, we have pointed out the fact that, "[i]n 1991, Congress determined that victims of employment discrimination were entitled to additional remedies. But, as legislative history makes clear, the 1991 Act would not have been passed by Congress *but for* the inclusion of a . . . damages cap." *Id.* at 1201 (citation omitted). We also ruminated on the legislative process and said:

> However, Congress has significant power to define and circumscribe self-created causes of action. Indeed, almost two decades ago, the Supreme Court articulated a vital distinction between common law causes of action and actionable rights created by Congress. Specifically, the Court noted that
>
> when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies. . . . Such provisions do, in a sense, affect the exercise of judicial power,

> but they are also incidental to Congress's power to define the right that it has created.
>
> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Title VII epitomizes such a congressionally created right. . . .

Id. at 1200. Based upon that, we definitively rejected the claims that Lansdale now makes based upon violation of the Separation of Powers Doctrine and invasion of the province of the jury in violation of the Seventh Amendment to the United States Constitution. *Id.* at 1200-02.

Nevertheless, argues Lansdale, the cap does violate the Equal Protection and Due Process clauses of the United States Constitution.[2] But, again, as we said in *Hemmings*, 285 F.3d at 1200-01, Congress does have the authority to prescribe, and limit, remedies. Beyond that, it is common knowledge that Congress is not required to solve every facet of a societal problem at the same time,[3] and we defer to its decisions,

---

2. Of course, the equal protection argument is, of necessity, a due process argument because it is a federal statute that we are dealing with. *See Vance v. Bradley*, 440 U.S. 93, 94 n. 1, 99 S.Ct. 939, 941 n. 1, 59 L.Ed.2d 171 (1979); *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 695, 98 L.Ed. 884 (1954). We will hereafter refer to equal protection principles only. Lansdale cites nothing to the contrary. If she did wish to make a different point, she has waived it by not briefing it. *See Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 n. 7 (9th Cir.1999).

3. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 757, 116 S.Ct. 2374, 2393, 135 L.Ed.2d 888 (1996).

even (or especially) compromises allocating the benefits and burdens arising out of our engagement in commercial life. *See Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963); *see also Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086-88 (9th Cir.2001). "Of course, the legislature must act in a rational manner; that almost goes without saying." *Lyon*, 252 F.3d at 1086. But there is nothing arbitrary or irrational about § 1981a. It certainly does not set up a facially invalid classification on the basis of gender. On the contrary, it treats all groups within its compass in the same manner. *See Madison v. IBP, Inc.*, 257 F.3d 780, 805 (8th Cir.2001), *vacated on other grounds*, __ U.S. __, 122 S.Ct. 2583, 153 L.Ed.2d 773 (2002). All are subject to its damage cap.

Thus, it is clear "that the statute must stand if it bears a rational relationship to any legitimate articulated government purpose." *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 946 (6th Cir.2000), *rev'd on other grounds*, 532 U.S. 843, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001); *see also Madison*, 257 F.3d at 805. It does.[4] As we indicated in

4. Lansdale has not presented any substantial evidence that Congress intended to discriminate against women when it enacted § 1981a(b)(3). On the contrary, it clearly acted to increase the rights of everyone who brought actions under Title VII, including women. Thus, we do not use intermediate scrutiny in our analysis. *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979); *Navarro v. Block*, 72 F.3d 712, 716 (9th Cir.1996); *Toomey v. Clark*, 876 F.2d 1433, 1436 n. 2 (9th Cir. 1989). Were we to do so, we are satisfied that the statute would also pass that level of review for much the same reasons as it passes rational basis review.

Hemmings,[5] and as other courts have declared: "In a political compromise, the Civil Rights Act of 1991 was limited in the remedies which it would provide due to a belief that unlimited damages for all forms of discrimination would force employers to institute hiring quotas for their own economic safety." *Pollard*, 213 F.3d at 946. Moreover, "Congress instituted the damages limitation in order to deter frivolous lawsuits and to protect employers from financially crippling awards, and the limitation is rationally related to these legitimate purposes." *Madison*, 257 F.3d at 805. This case underscores the basis for Congress's concern. While the jury awarded no out of pocket damages, it did award Lansdale $100,000 in damages for pain and suffering, mental anguish, shock and discomfort, and then went on to award her a whopping $1,000,000 in punitive damages.

Finally, despite Lansdale's suggestion to the contrary, Congress was hardly required to limit the already existing § 1981 rights of those who claimed that they had been subjected to race discrimination, whether in the workplace or elsewhere, in order to give some additional rights to others. *See Pollard*, 213 F.3d at 946. It would be middling strange to hold that protecting both genders against race discrimination somehow discriminates on the basis of gender unless the exact same protection is accorded when gender discrimination alone is involved. That appears to be a most unusual mixing of categories.[6] Beyond that, we fail to see

---

5. 285 F.3d at 1201.

6. It would not key on discrimination between men and women, or between one race and another, but, rather, on discrimination between race and women.

why Congress cannot show special concern for those who are subjected to race discrimination. In fact, race discrimination has been one of the most disruptive elements in our national life since the founding of our republic, and attempts to overcome all vestiges of that evil have formed "the cornerstone of our entire body of civil rights law." *Id.* Of all the vile types of discrimination, courts and Congress have treated race discrimination as the most vile of all.[7]

CONCLUSION

Congress made a laudable decision when it expanded the scope of recovery for those who are subjected to discrimination in employment. We cannot say that it also violated the Constitution of the United States when it chose to limit the amount of damages that could be recovered, even if it did not go on to limit damages recoverable under 42 U.S.C. § 1981.

It is not at all surprising that Lansdale wants even more than Congress provided; that is just the working out of one of human nature's quotidian drives. However, she must be content with her six figure judgment, faute de mieux.

AFFIRMED. The parties shall bear their own costs on appeal.

---

7. For example, laws that discriminate on the basis of race are subjected to the highest level of scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224, 115 S.Ct. 2097, 2111, 132 L.Ed.2d 158 (1995).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MARCH 29, 2001 AND FILED MARCH 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

97-CIV-2555-PHX-RGS

Jill Lansdale,

Plaintiff,

vs.

Hi-Health Supermart Corp.,

Defendant.

ORDER

On April 26, 2000, a jury found in favor of Plaintiff, Jill Lansdale, on her claim of sexual harassment under Title VII, awarding her $100,000 in compensatory damages and $1 million in punitive damages. Pending before the Court are several post-trial motions, including Defendant's motions for a new trial or for judgment as a matter of law, motions for attorneys' fees, cross motions pertaining to the size of the punitive damages award, and motions to strike or to supplement the record. For the reasons set forth below, the Court will sustain the verdict but will reduce the punitive damages award to comply with the $200,000 statutory

maximum under Title VII. The Court also will strike the Plaintiff's request for attorney's fees and deny the Defendant's request for attorneys' fees.

I. DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

A. Judgment as a Matter of Law

1. Legal Standard

Defendant moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a)(1). Entry of judgment as a matter of law is proper when the jury verdict is not supported by substantial evidence. *Mockler v. Multnomah County*, 140 F.3d 808, 815 n.8 (9th Cir. 1998); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979). As the Supreme Court recently clarified:

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inference from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to

> the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nomovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000).

2. Elements of sexual harassment

Title VII, 42 U.S.C. § 2000(e)-2(a)(1) makes it "unlawful . . . for an employer . . . to discriminate against any individual with respect to [her] compensation, terms, conditions or privileges of employment because of such individual's . . . sex." The workplace environment is deemed one of the "terms, conditions or privileges of employment," and thus if an individual is subjected to a hostile work environment based upon her gender, Title VII creates a cause of action. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-67 (1986).

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), the Supreme Court reiterated the standard by which workplace conduct was to be measured:

> This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out

> in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in an employee" . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation.

Determining whether a work environment is hostile is not a mathematically precise test. Factfinders should make such a determination by looking at all the circumstances, including the frequency of the alleged conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.* at 22-23.

3. Evidence adduced at trial

Ms. Lansdale worked at Hi-Health from October, 1996 through June, 1997, almost nine months. Plaintiff testified that during that time, her supervisor, Simon Chalpin, made at least fourteen gender-related, derogatory or sexually suggestive comments to her. Chalpin made a comment about her being "available" after a weekend in which she had worked so hard that her husband was angry. [Trial Transcript

("Tr.") at 277].[1] She interpreted his comment to mean that "my husband had been so upset with me that, you know, maybe he and I were — had a serious problem, and maybe I would consider something with Mr. Chalpin." [Tr. at 277].

In addition, she stated Chalpin made the following comments to her: (1) "Men were smarter than women" [Tr. at 255]; (2) "Think with the logic of a man" [Tr. at 236]; (3) "You're slimming up quite nicely" [Tr. at 271"]; (4) "Speaking of butts, I've noticed yours is getting smaller" [Tr. at 271]; (5) "Hi-Health was a slow-moving company because they had a woman in charge of merchandising, which was myself" [Tr. at 244]; (6) "I was slow because I was a woman" [Tr. at 246]; (7) "Women were slower than men" [Tr. at 252]; (8) "I should negotiate like a man, forget that I was a woman" [Tr. at 242]; (9) Carol Norwalk was a "dumb broad" [Tr. at 275]; (10) "I would like to sleep on those tonight" (referring to a buxom woman pictured in an advertisement) [Tr. at 274]; (11) "Boy, I can think of one thing I'd like to talk to her about" (referring to a stock photograph) [Tr. at 274]; (12) "That's a comment that only a woman would make" [Tr. at 262]; (13) "I got where I was because of my looks, or I got where I was because of my looks and my body" [Tr. at 270].

Other witnesses, including Judy Bell, Carol Norwalk, and Deborah Markett, corroborated some of Plaintiff's testimony. Bell heard Chalpin refer to men being smarter

---

1. The cited portions of the trial transcript are attached as an exhibit to Defendant's Renewed Motion for Judgment as a Matter of Law or, in the alternative, Motion for a New Trial (Doc. #157).

than women. [Tr. at 931]. Norwalk testified that Chalpin had commented that Plaintiff had gotten her job because of her "face" and her "boobs." [Tr. at 759]. Markett said that Chalpin broke up a conversation she was having with a female co-worker [Tr. at 813] and that Chalpin had used the work "broad" during a personal telephone call. [Tr. at 827]. Dworkin also stated she had heard Chalpin use the word "broad." [Tr. at 684].

4. Analysis

Defendant contends Chalpin's comments were not sufficiently severe, pervasive, or abusive to have a discriminatory impact on Plaintiff's working environment. Rather, the evidence shows only that Chalpin engaged in occasional gender-related teasing and joking, and that a reasonable person would not find his conduct severely hostile or abusive. Defendant relies on cases from other circuits granting summary judgment or overturning jury verdicts where the evidence was arguably more egregious than in the instant case. *See, e.g., Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000) (reversing jury verdict and entering judgment as a matter of law, where supervisor touched the plaintiff on the knee and thigh, lifted the hem of her dress, greeted her in his undershirt when she arrived at his office and unzipped his pants to tuck in his shirt); *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (affirming judgment as a matter of law where supervisor rubbed his hip against plaintiff's hip, on two instances made a sniffing sound while looking at her groin area, and constantly followed her around and stared at her); *Baskerville v. Culligan Int'l. Co.*,

50 F.3d 428, 430 (7th Cir. 1995) (reversing jury verdict, even though supervisor's conduct, including masturbation gestures, grunting at women, and suggesting that "pretty girls" should "run around naked," were adolescent and crude).

Defendant has not cited, nor has the Court's research uncovered, any Ninth Circuit cases setting the bar for sexual harassment claims quite so high as the cases cited above. Moreover, at least two other circuits have declined to enter judgment for the defendant based on evidence that was comparable in severity and pervasiveness to that adduced here. *See Rorie v. United Parcel Service, Inc.*, 151 F.3d 757 (8th Cir. 1998) (reversing award of summary judgment to defendant, where supervisor patted a female employee on the back, brushed up against her, and told her she smelled good); *Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997) (affirming district court's denial of defendant's motion for judgment as a matter of law based on six, sexually-disparaging remarks made over the course of 23 months).

The evidence adduced at trial in this case is on the borderline of culpable conduct under Title VII. Nevertheless, in the absence of more explicit guidance from the Ninth Circuit, and in light of the highly fact-specific inquiry at issue, the Court declines to upset the jury verdict and accordingly will deny Defendant's motion for judgment as a matter of law.

Appendix C

B. New Trial

In the alternative, Defendant moves for a new trial pursuant to Fed. R. Civ. P. 59. A motion for a new trial should be denied unless the verdict "is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." *Vegegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987). Defendant contends that the following circumstances demand a new trial in this case: (1) the Court wrongly rejected one of Defendant's peremptory challenges to a juror; (2) the Court wrongly submitted the issue of punitive damages to the jury; (3) Plaintiff's counsel committed misconduct which seriously prejudiced the jury; and (4) the Court wrongly admitted the testimony of Brenda Nitchen, and such testimony seriously prejudiced the jury. These issues will be addressed in turn.

1. Rejection of Defendant's Peremptory Challenge

During jury selection, counsel for Hi-Health exercised peremptory strikes against three jurors — Sandoval, a Hispanic man, and Easley and Prins, Caucasian women. Plaintiff objected to the strikes on the ground that the three individuals were "minorities," citing *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court asked counsel for Defendant to state its reasons for striking the jurors, and with respect to the women, counsel replied:

> . . . Leanne Easley, she was a third grade teacher. I would prefer to have on the panel people who have worked in the industry, who are used to being in corporations. Her life has been spent as a

> teacher of young children. She's not likely to have worked in the same kind of environment that the plaintiff worked in or that Mr. Chalpin is familiar with. So I thought she would be inappropriate given the others in this case.
>
> It's all a comparative process, of course. She also had raised her hand in response to Mr. Montoya's question about things that she would find offensive to work — at work. And according to my records, she would find all of the comments offensive. And I assume that's why Mr. Montoya asked the question, to find out who might find it offensive and who wouldn't. I thought she was a little too quick, quite frankly, to find all of that offensive.
>
> The same could be said for Victoria Prins. She works for the county. She hasn't worked in private industry. She's not familiar with the environment in private industry as many of the other people were. She was quick to raise her hand and she found these kinds of things offensive. And that's why we struck her.

[Tr. at 55-56]. Plaintiff's counsel did not respond to defense counsel's stated reasons for the three strikes. The Court then delivered its ruling, allowing the peremptory strikes of Sandoval and Easley, but not of Prins. Defendant contends that by allowing Prins to sit on the jury, the Court committed reversible error. Defendant's argument is unpersuasive.

Appendix C

It is a violation of equal protection for a party to reject a juror solely on the basis of gender. *See J.E.B. v. Alabama*, 511 U.S. 127 (1994). Thus, when a party raises a challenge to a proposed peremptory strike, the party exercising the strike must describe a juror characteristic other than gender that motivated the strike, and the proffered explanation may not be pretextual. *Id.* at 143. The Court has a duty to make the determination of pretext based on all the facts and circumstances, including the persuasiveness of the proffered explanation, and a comparison of the characteristics of jurors of the opposite gender who were not stricken. *See McClain v. Prunty*, 217 F.3d 1209, 1219-1220 (9th Cir. 2000).

In this case, defense counsel stated he wished to strike Ms. Prins for two reasons: first, she raised her hand in response to a question about whether she found sex-related comments or pictures to be offensive; and second, she had not worked in private industry. The Court found these proffered reasons to be pretextual, as no persuasive rationale was offered to support the strike.

Although the Court has no current recollection of the specific responses to the question concerning the offensive nature of sexual jokes, pictures, remarks, teasing or subtle sexual hints, it is Plaintiff's counsel's recollection that several male jurors also raised their hands, yet none of these prospective jurors were the subjects of Defendant's peremptory strikes.

As to Ms. Prins' lack of experience in private industry, the Court noticed that Defendant did not strike a male juror, Duane Howard, who, like Ms. Prins, did not work in private

industry. In any event, the Court found unconvincing the notion that there is a difference material to this case between working in the public versus the private sector. The purported distinction is particularly immaterial as applied to Ms. Prins' position as a finance director for Maricopa County, a professional position like that held by plaintiff. By contrast, juror Easely's job as a schoolteacher involved a markedly different environment — one which places her around children instead of adults for much of the day — thus providing greater justification for striking her from the panel. Based on the totality of the circumstances, the Court properly found that Defendant's proffered explanations for striking Prins were a pretext for gender discrimination. Defendant is therefore not entitled to a new trial on this ground.

2. Submission of Punitive Damages to Jury

Defendant also argues it is entitled to a new trial, because the Court wrongly allowed the jury to consider an award of punitive damages. The Court disagrees.

Punitive damages awards for violation of Title VII are governed by 42 U.S.C. § 1981a(b)(1). The relevant portion of subsection (b) provides:

> A complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Appendix C

The Supreme Court recently clarified the definitions of "malice" and "reckless indifference" in *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 535 (1999). The Court explained that those terms do not relate to the employer's awareness that it is engaging in discrimination, but instead focus on the employer's knowledge that it may be acting in violation of federal law. *Id.* To act with the state of mind required to justify punitive damages, an employer must, at a minimum, "discriminate in the face of a perceived risk that its actions will violate federal law." *Id.* at 536. Intentional discrimination would not give rise to punitive damages under this standard if the theory of discrimination advanced by the plaintiff is sufficiently "novel" or "poorly recognized" at the time of the conduct, or if the employer is "simply unaware" that the law prohibits the conduct. *Id.* Defendant contends the Court erred, because Plaintiff's theory of gender-based sexual harassment was novel, and because the evidence showed that Chalpin was unaware that his conduct violated federal law. The Court finds these arguments unpersuasive.

a. Whether theory was "novel"

Defendant first argues that Plaintiff's claim for unlawful harassment was novel, because it was based on her allegation that Chalpin had made "gender-biased" remarks; she did not allege that Chalpin had made pervasive comments of a "sexual" nature, or that Chalpin ever touched her inappropriately or pressured her to have any type of sexual relationship. Defendant relies on the Court's ruling on Defendant's summary judgment motion that gender-based harassment had never before been addressed in the Ninth Circuit. (*See* Doc. #71 at 7.)

Defendant fails to point out, however, that this Court also observed in its ruling that other circuits had explicitly recognized gender-based sexual harassment as a form of actionable discrimination under Title VII. *Id.*; *see also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988). Under the circumstances, the Court does not find that Plaintiff's theory was either "novel" or "poorly recognized" within the meaning of *Kolstad*. Indeed, in light of the authority from other jurisdictions, Defendant certainly could have been acting in spite of a risk that its conduct violated the law.

b. Chalpin "Simply Unaware"

Defendant further argues that Chalpin was "simply unaware" that his comments violated federal law. Defendant notes that Chalpin and other witnesses testified that his comments were made in jest, and he did not believe he was offending anyone. Because a hostile environment/sexual harassment claim depends upon the effect of comments on the listener, Defendant reasons that Chalpin's belief that his comments did not offend anyone mandates a finding that he was unaware that he was breaking the law. This argument is unpersuasive. The jury, of course, was entitled to disbelieve Chalpin's testimony.

3. Misconduct by Plaintiff's Counsel

Defendant also contends the Court should grant a new trial because Plaintiff's attorney committed misconduct prejudicial to Defendant by 1) violating Court orders

regarding the admissibility of certain testimony and 2) asking questions with no factual basis and thereby testifying to the jury. A new trial is warranted if opposing counsel's misconduct " 'sufficiently permeate[d] the entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Kehr v. Smith Barney, Harris & Upham Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (quoting *Standard Oil Co. of California v. Perkins*, 347 F.2d 379, 388 (9th Cir. 1965). *See also Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 346 (9th Cir. 1995). Although the Court agrees that Plaintiff's attorney committed misconduct, the Court finds that such misconduct did not sufficiently permeate the proceeding so as to warrant a new trial.

The misconduct was as follows. First, despite a prior ruling that evidence of racially discriminatory conduct would not be admitted (*see* Doc. #109 at 9), counsel for Plaintiff made one statement and asked one question of a witness implying that race discrimination occurred at Hi-Health. The first statement was made to Jill Lansdale. During her testimony, she stated that comments about her gender were not funny, because "You don't make racist jokes to a Black person in the workplace." [Tr. at 365]. After the Court then sustained Defendant's objection, counsel for Plaintiff stated, "And let's not talk about racist jokes *to proceed quickly*." [Tr. at 365-66] (emphasis added). Defendant contends this comment implied that there was unelicited testimony about racist jokes. Second, counsel for Plaintiff asked Mr. Chalpin, "Have you ever hired a minority at Hi-Health?" [Tr. at 513]. Defendant's objection was sustained, and during a recess, the Court ruled that counsel's conduct was "a clear violation

of the Court's Order" and stated that it would "consider later what sanction, if any, to impose." [Tr. at 516].

Although the Court had ruled that evidence of race discrimination would be inadmissible at trial, the Court does not find that these two references prejudiced the jury. The first instance, in which plaintiff's counsel told Ms. Lansdale not to discuss race "to proceed quickly," did not necessarily imply that he would be glossing over evidence of race discrimination. Counsel could just as easily have been asking Ms. Lansdale not to discuss any further the idea of racist jokes as a metaphor for the type of discrimination she allegedly experienced.

The second instance, in which counsel asked Mr. Chalpin if he'd ever hired a minority, is more problematic. Nevertheless, Defendant's objection was sustained, and Mr. Chalpin did not answer the question. Under the circumstances, and in light of the substantial evidence supporting the jury's verdict, the Court does not believe that Plaintiff's having asked the question warrants a new trial.

Plaintiff also asked a question of another witness, Scott Christensen, which appeared calculated to malign Mr. Chalpin's character in violation of a Court order adopting a stipulation of the parties. (*See* Doc. #85, Doc. #81). The question was whether Chalpin had ever told Christensen that he "needed to hack out part of [his] brain?" The Court also finds this question did not prejudice the jury. This is particularly true in light of the fact that part of Hi-Health's strategy, as reflected in its opening statement, was to acknowledge that Chalpin may have been hard on his employees.

Appendix C

In addition to flouting the Court's Orders, Plaintiff's counsel also asked several questions which appeared to lack evidentiary foundation.[2] The Court has reviewed these

---

2. These questions included the following:

• Montoya asked Scott Christensen if he had ever described Chalpin as a "horrible person" [Tr. at 1082], but no witness ever testified to that effect, and Montoya offered no evidence that Christensen had ever said such a thing.

• In cross-examining Christensen, Montoya stated that he had overheard Christensen and Chalpin talking outside the courtroom about a "mutual venture" [Tr. at 1081], Christensen denied discussing such a "mutual venture."

• In questioning Hi-Health's senior buyer, Jay Chopra, Montoya asked if he knew "that your colleagues at Hi-Health refer to you as, quote, Sy's little yes man, unquote . . . ?" [Tr. at 1187]. Neither Chopra nor his colleagues ever testified to such a name.

• Montoya asked Chalpin whether he had ever stated that "no women had ever been the president of a Fortune 500 company." [Tr. at 579]. Montoya never put such a comment into evidence through any witness.

• Montoya asked Chalpin if he had ever been reprimanded or criticized for violating his own policies [Tr. at 626]. The one occasion on which Chalpin had been so criticized involved an event which occurred in September 1997 and was ruled inadmissible by the Court.

(Cont'd)

statements in light of the entire record, and finds that they were insufficient to prejudice the jury.

Thus, although the Court finds Plaintiff's counsel's conduct inexcusable, the Court is not convinced that it caused the jury to be motivated by passion or prejudice in reaching its verdict.

4. Admission of Brenda Nitchen's Testimony

Defendant further argues a new trial is necessary because the Court wrongly allowed the Plaintiff to call Brenda Nitchen as a witness. Nitchen testified that Mr. Chalpin had

---

(Cont'd)

> • During Scott Dalton's testimony, Montoya asked whether Dalton thought "that Mr. Chalpin had two separate standards regarding his treatment of men and women at Hi-Health?" [Tr. at 193]. Hi-Health's objection was sustained.
>
> • Montoya asked former employee Manning whether Chalpin had ever tried to "to hurt your career by spreading malicious rumors about your professional competence . . . . [or] about your personal life or your personal integrity." [Tr. at 483]. Although Manning answered the questions negatively, Montoya had clearly suggested to the jury his own knowledge of such misconducted by Chalpin, and no witness ever testified on those subjects.
>
> • Montoya personally informed the jury in closing, "I didn't meet with them extensively. . . . My witnesses were not prepped [Tr. at 1457].

told her on one occasion "how wonderful you looked today" — "will you go home with me?" On another occasion a week later, he asked her if she "could have two lovers," a reference to the fact that she was married. [Tr. at 859, 861]. Defendant argues Nitchen should have been precluded from testifying for two reasons. First, Nitchen's testimony was irrelevant and unfairly prejudicial, and second, Plaintiff did not reveal her intention to call Nitchen as a witness until halfway through the trial.

Defendant argues that Nitchen's testimony was irrelevant because Plaintiff did not personally observe the incidents Nitchen described. Indeed, they occurred over 17 months after Plaintiff left the company, and therefore Defendant contends they were too remote in time, too attenuated, and too dissimilar from Plaintiff's situation to be relevant. Instead, Defendant contends Nitchen's testimony was really only "evidence of other wrongful acts" that would demonstrate Mr. Chalpin's character in order to show that he acted in conformity with that character during Lansdale's employment, in violation of Fed. R. Evid. 404(b).

The Court finds, however, that Nitchen's testimony was relevant despite the fact that the comments Chalpin made to her post-dated Plaintiff's employment. The testimony provided context for interpreting Chalpin's comments which were directed toward Ms. Lansdale. Specifically, it shed light on whether the harassment by Chalpin was sexually discriminatory, as well as "the motive behind the harassment, which [helped] the jury interpret otherwise ambiguous acts." *Hurley v. The Atlantic City Police Department*, 174 F.3d 95, 110 (3rd Cir. 1999) (affirming the admission of testimony of

acts of harassment of other women of which the plaintiff had been unaware). Indeed, evidence regarding harassment of others of which the plaintiff was unaware is particularly probative where, as here, the employer's primary defense is that "the incidents of abuse [Plaintiff] suffered were trivial horseplay to which both men and women were subjected. . . ." *Id.* Thus, Nitchen's testimony "creates a basis for an inference that [Plaintiff] was targeted for abuse because she was a woman." *Id.* Because the evidence is highly probative, "it is unlikely that any putative prejudice therefrom will be unfair or will outweigh its value." *Id.*[3]

The argument that Plaintiff disclosed her intention to call Nitchen as a witness too late is unpersuasive. It was not until the middle of the trial — when she received a telephone call from Nitchen — that Plaintiff learned that Nitchen allegedly had been harassed by Mr. Chalpin. Defendant, however, knew about Nitchen's allegations and had failed to disclose them to the Plaintiff before the beginning of the trial.

Defendant contends it had no obligation to disclose the facts regarding Nitchen. The Court disagrees. At the outset of litigation, a party is required to disclose the identity of persons with information relevant to facts alleged in the

---

3. Contrary to Defendant's suggestion, in ruling on Defendant's motion in limine, the Court did not rule that *all* incidents of misconduct post-dating Plaintiff's employment would be inadmissible. Rather, the Court held that incidents post-dating Lansdale's employment that involved neither Lansdale nor Chalpin would not be admitted. (*See* Doc. #109 at 3-4). Nitchen's allegations, however, involved Mr. Chalpin, and therefore assumed greater probative value.

Complaint. *See* Fed. R. Civ. P. 26(a). In addition, a party is required to supplement such disclosures "at appropriate intervals" if they are incomplete. *See* Fed. R. Civ. P. 26(e). Under these rules, Defendant had an obligation to identify Ms. Nitchen prior to trial. To the extent there existed any ambiguity about Defendant's obligations because of questions regarding the relevance of her testimony, the Court's ruling on April 10, 2000 (Doc. #109 at 12) should have clarified them. That ruling allowed two other witnesses to testify regarding events involving Mr. Chalpin which took place after Plaintiff's having left Hi-Health. The ruling therefore clearly signaled the Court's view that incidents post-dating Plaintiff's employment, if they involved Chalpin, would be admissible.

In addition, in April, 1998, Plaintiff had propounded an interrogatory that requested information about other incidents of harassment at the company "during the past five years." Nitchen's allegations concerned events in December 1998, after the interrogatory was served. Nevertheless, under Fed. R. Civ. P. 26(e)(2), a party is required "seasonably to amend a prior response to an interrogatory . . . if the party learns that the response is in some material respect incomplete or incorrect. . . ." Thus, Defendant arguably had a duty not only under Rule 26(a), but also under Rule 26(e) to supplement its response to the interrogatory with the information regarding Nitchen.

In any event, even if Defendant had not been under any prior obligation to disclose the facts about Nitchen, defense counsel could have deposed her during the trial; they declined to do so. Under such circumstances, Defendant was not unfairly prejudiced.

Appendix C

II. DEFENDANT'S MOTION TO CONFORM VERDICT TO STATUTORY LIMITATION, AND PLAINTIFF'S CROSS-MOTION TO DECLARE STATUTE LIMITING DAMAGE AWARD UNCONSTITUTIONAL

Defendant moves the Court, pursuant to 42 U.S.C. § 1981a(b)(3)(C), to reduce the jury verdict of $1.1 million to the maximum amount permitted under the law for employers with between 200 and 501 employees — $200,000. Plaintiff opposes the motion and cross-moves the Court for a declaration that § 1981a(b)(3)(C) is unconstitutional under the due process and equal protection clauses of the Fifth Amendment, the Seventh Amendment, and the separation of powers doctrine. The United States has also moved to intervene to defend the constitutionality of the statute and submitted a brief in support of its position.

Defendant and the United States correctly observe that every court which has addressed the issue has affirmed the constitutionality of the damages limitations. *See, e.g.*, *Pollard v. E.I. DuPont De Nemours Co.*, 213 F.3d 933 (6th Cir. 2000), *cert. granted*, 121 S. Ct. 756 (Jan. 8, 2001) (rejecting equal protection, due process, separation of powers challenges); *Means v. Shyam Corp.*, 44 F. Supp. 2d 129, 132 (D.N.H. 1999) (rejecting due process and equal protection challenges); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 982 F. Supp. 786, 788 (W.D. Wash. 1997), *aff'd in part & vacated in part & remanded on other grounds*, 212 F.3d 493 (9th Cir. 2000) (rejecting Seventh Amendment challenge). The Court has reviewed these authorities and finds their reasoning to be persuasive. Accordingly, the Court will grant Defendant's motion to reduce the damages award and deny

Plaintiff's cross motion to declare the statue limiting such awards unconstitutional. The damages award will be reduced to $200,000.

III. PLAINTIFF'S SECOND MOTION TO SUPPLEMENT HER FINAL DISCLOSURE STATEMENT, DEFENDANT'S MOTION TO STRIKE SUCH MOTION, AND PLAINTIFF'S REQUEST TO GRANT SUCH MOTION PURSUANT TO LOCAL RULE 1.10(i)

Plaintiff has moved to supplement her final disclosure statement to add a trial witness in the event the Court grants Defendant's pending motion for a new trial. The witness would testify to several discriminatory comments that Mr. Chalpin made to her. In addition, she would testify that another trial witness for the Defendant, Jay Chopra, told her that he lied at trial. Defendant has moved to strike Plaintiff's motion, arguing that Plaintiff is using the motion as a tactic to place before the Court inflammatory evidence which the Court might consider relevant to Defendant's pending motion for a new trial. Defendant did not file an opposition to the motion to supplement, and therefore Plaintiff also has moved the Court to grant the motion to supplement as unopposed, pursuant to Local Rule 1.10(i).

Because the Court is not granting Defendant's motion for a new trial, all three motions will be denied as moot.

Appendix C

IV. ATTORNEYS' FEES

A. Plaintiff's Motion for Attorneys' Fees and Non-taxable Costs and Defendant's Motion to Strike

As the prevailing party on the gender/sexual harassment claim, Plaintiff has filed a motion seeking $179,630 in attorneys' fees, representing 781 hours of work at a rate of $230 per hour. Defendant has not filed an opposition to the motion but has, instead, filed a motion to strike it on the grounds that it was not filed in a timely manner as required by the federal and local rules. Defendant's motion will be granted, and Plaintiff's motion for attorney's fees will be stricken.

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure states that "unless otherwise provided by statute or order of the court, the motion [for attorneys fees and non-taxable expenses] must be filed and served no later than 14 days after entry of the judgment. . . .". Final judgment was entered in this case on May 4, 2000. Plaintiff filed a Motion for an Extension of Time in Which to File Application for Taxation of Costs on May 22, 2000.[4]

According to Defendant, Plaintiff's May 22, 2000 motion for an extension of time was late, because counting 14 days

---

4. The Court granted the Plaintiff's motion for extension of time before Defendant had an opportunity to respond. Defendant has filed a motion for reconsideration, arguing that the Plaintiff requested the extension beyond the deadline. Because the Court will grant the motion to strike, the Court will deny the motion for reconsideration as moot.

from May 4, 2000, Plaintiff's request for fees was due on Thursday, May 18, 2000. Plaintiff responds that under Fed. R. Civ. P. 6(e), she was entitled to add three days to the filing date because the judgment was served on her by mail, and therefore her request was due on Monday, May 22, 2000. Rule 6(e) states that "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period."

Plaintiff's position is incorrect. Rule 6(e) does not apply to motions for attorneys' fees, because the deadline provided by Rule 54 runs from the *entry* of judgment — not from the *service* of notice by mail of the judgment. *See Kyle v. Campbell Soup Co.*, 28 F.3d 928, 929 (9th Cir. 1994). Rule 6(e) and local rules permitting extra time for mailing "only enlarge the filing time when the period for acting runs from the service of a notice by mail." *Id.* at 930.

Accordingly, Defendant's Motion to Strike Plaintiff's untimely request for fees will be granted.

B. Defendant's Motion for Attorneys' Fees and Related Non-taxable expenses.

Defendant moves for an award of $76,159.66 in attorneys' fees, arguing that it prevailed on summary judgment on four of the five claims in the lawsuit and that Plaintiff pursued frivolous and unreasonable litigation with the intent to harass Defendant. The claims upon which Defendant prevailed included a retaliation claim under Title VII and

three state law tort claims — intentional infliction of emotional distress, wrongful termination, and outrage. For the reasons set forth below, the Court will deny Defendant's request for attorneys' fees.

1. Title VII Retaliation Claim

Under 42 U.S.C. § 2000e-5k, the prevailing party in a Title VII action is entitled to attorneys fees. The statute provides:

> [I]n any action or proceeding under this title, the Court, in its discretion, may allow the prevailing party, other than the commission or the United States, a reasonable attorneys fee as a part of the cost.

42 U.S.C. § 2000e-5k. If the prevailing party is the defendant, however, the party is entitled to fees only if the plaintiff's action was "frivolous, unreasonable, or without foundation" or if "the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). The Ninth Circuit defines a "frivolous" action as one in which "[either] party could have predicted the outcome with absolute confidence." *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1301 (9th Cir. 1981).

Defendant contends Plaintiff's retaliation claim was frivolous because (1) she failed to invoke and exhaust her administrative remedies on the retaliation claim, and (2) there was overwhelming and undisputed evidence of her poor work performance, which was the actual reason for her discharge.

Defendant also urges the Court to consider the policy objective behind attorneys' fees awards to deter frivolous litigation. *See Christiansburg Garment Co.*, 434 U.S. at 420.

The Court finds that the retaliation claim, though meritless, was not frivolous. As Plaintiff argued in opposing Defendants' motion for summary judgment, EEOC complaints are liberally construed. Therefore, although Ms. Lansdale did not check the box on the EEOC form indicating a complaint for retaliation, a court might have found that her complaint reasonably included such a charge. Certainly an argument that it did would not fall outside the bounds of zealous advocacy. Defendant's contention that the retaliation claim was frivolous because Lansdale's poor work performance was the true reason for her discharge is similarly unconvincing. The Court made no such finding in its ruling on summary judgment and is unwilling to do so now. Accordingly, the Court finds that Defendant is not entitled to collect fees for its defense of this claim.

2. Tort claims

Arizona law also enables a prevailing party to collect attorneys' fees in limited circumstances. The applicable statute provides as follows:

> The court shall award reasonable attorneys' fees in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith.

Appendix C

A.R.S. § 12-341.01(C). In addition, a court may impose attorneys' fees if an attorney or party:

1. Brings or defends a claim without substantial justification.

2. Brings or defends a claim solely or primarily for delay or harassment.

3. Unreasonably expands or delays the proceeding.

4. Engages in abuse of discovery.

A.R.S. § 12-349(A). For purposes of this statute, "without substantial justification" is defined to mean that the claim "constitutes harassment, is groundless and is not made in good faith." A.R.S. § 12-349(F).

Defendants prevailed on all of Plaintiff's state law claims on summary judgment. They now contend they are entitled to collect attorneys' fees, because (1) the tort of outrage is not a recognized cause of action in Arizona, *see Rowland v. Union Hills Country Club*, 157 Ariz. 301, 304, 757 P.2d 105, 108 (Ct. App. 1988); (2) Plaintiff never addressed her wrongful termination claim in opposition to Defendants' motion for summary judgment; (3) with respect to her intentional infliction of emotional distress claim, she never consulted a single therapeutic counselor as a result of her supposed severe emotional distress, and she never alleged any extreme or outrageous conduct as required by law. *See Mintz v. Bell Atlantic Sys. Leasing Int'l, Inc.*, 183 Ariz.

550, 553-54, 905 P.2d 559, 562-63 (Ct. App. 1995). In addition, despite repeated requests for her medical records from January 1998 forward, Plaintiff failed to produce any documents regarding her medical history until one month before trial.

Although the claims were meritless, the Court does not find clear and convincing evidence that they constituted harassment, were groundless, and were not made in good faith, all of which must be found under A.R.S. § 12-341.01 to justify an award of fees. Nor does the Court find that any of the circumstances set forth in A.R.S. § 12-349 is applicable here.

Based on the foregoing,

IT IS ORDERED granting Defendant's motion to conform verdict to statutory limitation (Doc. #129); the verdict is hereby reduced to $200,000;

IT IS FURTHER ORDERED denying Defendant's motion for award of attorney's fees and related non-taxable expenses (Doc. #156);

IT IS FURTHER ORDERED denying Defendant's motions for judgment as a matter of law or for a new trial (Doc. # 157-1, 157-2);

IT IS FURTHER ORDERED striking Plaintiff's motion for an award of attorney's fees and taxable costs (Doc. #161);

Appendix C

IT IS FURTHER ORDERED denying Defendant's motion for reconsideration of May 23, 2000 Order granting Plaintiff's motion for extension of time to file application for taxation of costs (Doc. #165);

IT IS FURTHER ORDERED granting Defendant's motion to strike Plaintiff's motion seeking award of attorney's fees and costs (Doc. #169);

IT IS FURTHER ORDERED denying Plaintiff's motion to declare the damage limitations of the Civil Rights Act of 1991 unconstitutional (Doc. #186);

IT IS FURTHER ORDERED granting the unopposed motion of the United States to intervene to defend the constitutionality of 42 U.S.C. § 1981a(b) (Doc. #192);

IT IS FURTHER ORDERED denying Plaintiff's (second motion) to supplement her final disclosure statement (Doc. #199);

IT IS FURTHER ORDERED denying Defendant Chalpin's motion to strike Plaintiff's second motion to supplement her final disclosure statement (Doc. #200);

IT IS FURTHER ORDERED denying Plaintiff's motion for order granting Plaintiff's second motion to supplement her final disclosure statement (Doc. #202).

Appendix C

DATED this *29th* day of *March*, 2001.

s/ Roger G. Strand
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED SEPTEMBER 26, 1999 AND FILED SEPTEMBER 28, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 97-2555-PHX-RGS

JILL LANSDALE,

Plaintiff,

vs.

HI-HEALTH SUPERMART CORPORATION
and SIMON CHALPIN,

Defendants.

ORDER

Pending before this Court is defendants' motion for summary judgment. The matter was fully briefed[1] and oral

1. After plaintiff filed her response and defendants filed their reply, plaintiff, without seeking leave of court, filed four documents of supplemental authority. *See* filings of April 22, 1999 [doc. #66], May 3, 1999 [doc. #67], May 6, 1999 [doc. #68], and May 25, 1999 [doc. #70]. Plaintiff's filing are little more than lists of citations to cases, only one of which includes newly published opinions. Notice to the Court of new case law not in existence at the time of filing a memorandum may be appropriate, e.g., plaintiff's filing of April 22, 1999 [doc. #66]; however, that is not the present situation. Plaintiff offers no justification for failing to seek leave of court or for failing

(Cont'd)

argument heard on May 10, 1999. For the following reasons, defendants' motion is granted in part and denied in part.

Procedural History

Plaintiff, Jill Lansdale, ("Lansdale"), filed a complaint with the Equal Employment Opportunity Commission ("EEOC") in September, 1997, alleging that her rights had been violated pursuant to Title VII of the Civil Rights Act of 1964. Specifically, she alleged that during the time she was employed by defendant Hi-Health Supermart ("Hi-Health"), defendant Simon Chalpin ("Chalpin"), president and owner of Hi-Health, sexually harassed her and as a result, created a hostile work environment. Defendant's Statement of Undisputed Material Facts ("DSOF"), Exh. 7. Lansdale received a right to sue letter from the EEOC on November 7, 1997, and subsequently filed a complaint in this Court on December 11, 1997.

In her Complaint, Lansdale alleges that she had been sexually harassed; that she was discharged in retaliation for her objections to the alleged harassing behavior; and that

---

(Cont'd)

to cite the cases in her responsive memorandum. The Court notes, however, that, plaintiff did cite some of the cases in her response and thus, there is no justification for further "supplemental" citation. Plaintiff's unauthorized attempt to submit additional case law and legal argument under the circumstances is unwarranted and not contemplated by either the Federal Rules of Civil Procedure or the Rules of Practice for the United States District Court for the District of Arizona. Accordingly, plaintiff's supplemental filings of May 3, May 6 and May 25, 1999, will be stricken from the record.

Hi-Health failed to take any remedial action upon learning of the harassment. Pursuant to the state law of Arizona, Lansdale alleged that she was wrongfully terminated and that Chalpin had intentionally inflicted emotional distress upon her. Lansdale also alleged the tort of outrage.

On December 1, 1998, defendants filed a motion for summary judgment as to all claims. Lansdale, in her response to the motion for summary judgment, stated that she was not "asserting wrongful termination or the tort of outrage claims against either defendant under Arizona law." Plaintiff's Response at 7, n.4. Therefore, the claims pending before this Court are plaintiff's Title VII sexual harassment/hostile working environment claim, retaliatory discharge, and the state law claim of intentional infliction of emotional distress.

FACTUAL BACKGROUND[2]

Lansdale was hired by Hi-Health on October 18, 1996. Chalpin, owner and president of Hi-Health, personally interviewed Lansdale. Initially, Lansdale's was hired as a buyer at a salary of approximately $45,000.00 per year. It was understood that after a probationary period, she would assume the position of General Merchandising Manager. On December 2, 1996, Lansdale assumed the duties of General Merchandising Manager and received a salary increase to approximately $80,000.00 per year. DSOF, Exh. 2.

---

2. Because this is a motion for summary judgment, the factual background is taken primarily from the statement of facts filed by the plaintiff.

Appendix D

Lansdale's duties and responsibilities required that she work closely with Chalpin. Lansdale performed her duties as General Merchandising Manager until June 30, 1997. On June 30, 1997, Lansdale was terminated for allegedly poor job performance. During the time she was employed as General Merchandising Manager, Lansdale received eleven "challenge notes." These notes indicated that some type of problem had arisen and that some action was required on Lansdale's part to resolve or explain the problem. Often the notes related to Lansdale's failure to timely submit sign or advertising information. DSOF, Exh. 4. Further, it is uncontradicted that Lansdale and Chalpin disagreed over training and advertising strategy. Lansdale had been advised by the human resource department that two employees had resigned their positions at Hi-Health, in part, because they were dissatisfied with the way Lansdale's department worked.[3] Further, Lansdale and Chalpin disagreed as to the manner in which advertising was to be solicited. According to Lansdale, Chalpin expected Lansdale to inflate sales figures of certain products in order to receive more advertising dollars. Lansdale's opinion was that the advertising practices advocated by Chalpin consisted of lying on a continual basis and were fraudulent. Lansdale refused to lie. DSOF, Lansdale Deposition at 102-03. Lansdale and Chalpin engaged in heated arguments regarding this issue. *Id.* at 106.

---

3. Lansdale has not provided any evidence that the performance deficiencies alleged are untrue.

Appendix D

Lansdale alleges that Chalpin consistently verbally belittled women in the workplace. Lansdale alleges that on at least thirty separate occasions Chalpin made comments to her or others which indicated his gender bias.[4] The comments fall in to several general categories: comments made by Chalpin about the inferiority of women to men in the business world; specific statements regarding Lansdale's competence; comments about female anatomy; remarks regarding Lansdale's weight loss; statements about other employee's intelligence; and the frequent use of the words "boobs" and "prick." Some of the statements complained of by Lansdale were not made to her but to others. Other employees, in deposition testimony, allege that Chalpin made gender-based remarks on a regular basis. PSOF, Exh. D, Dworkin Deposition; Exh. E, Bell Deposition; Exh. F, Markett Deposition. Carol Norwalk, a former Hi-Health Supermart employee, testified in deposition that Chalpin made a remark about Lansdale's body getting her a job. Norwalk also testified that Chalpin spoke to women in the workplace with less respect, made numerous women in the workplace cry by talking more abusively to women than men, and imposed lunch scheduling requirements on women employees but not on male employees. PSOF, EXH., Norwalk Deposition. Lansdale alleges that Chalpin's behavior created a hostile

4. In the interest of economy and efficiency, the text of the alleged remarks have not been repeated here in their entirety. Plaintiff's Response to Defendants' Motion for Summary Judgment and Plaintiff's Statement of Facts set forth each allegedly sexually harassing or gender biased remark attributed to Chalpin. For the purposes of summary judgment only, defendants concede that Chalpin did make the comments.

work environment.[5] Plaintiff states that she complained about Chalpin's behavior to Scott Dalton, Hi-Health's human resources director, and asked for advice on how she could handle the situation. PSOF, Exh. ¶45; Lansdale Deposition at 87-90. Plaintiff contends that Dalton did not take any action as the result of Lansdale's conversations with him. Lansdale alleges that her termination from Hi-Health was the result of her complaints about Chalpin's behavior.

ANALYSIS

Hostile Working Environment

To prove a case of sexual harassment under a hostile workplace theory, Lansdale must show that: 1) she was subjected to verbal or physical conduct of a sexual nature, 2) this conduct was unwelcome, and 3) the conduct was sufficiently severe or pervasive to alter the condition of her employment and create an abusive working environment. *Fuller v. City of Oakland California*, 47 F.3d 1522, 1527 (9th Cir. 1995). For the purposes of summary judgment, Lansdale has shown that she was subjected to sexual and/or gender-biased remarks and the conduct was unwelcome. She told Chalpin directly that his gender based derogatory remarks offended her and she also complained to Scott Dalton.

---

5. In her deposition testimony, Lansdale admits that no discrimination existed as to salary, vacation days, sick time, office space, or staff. DSOF, Lansdale Deposition at 23-4. Lansdale stated that she did not suffer any other discrimination based on her gender at Hi-Health other than there were unwelcome sexually suggestive and sexually offensive comments made. *Id.* at 24.

Appendix D

The Ninth Circuit has not yet specifically addressed whether or not a plaintiff can demonstrate a sufficient claim of "sexual harassment" if the conduct alleged is gender based and not explicitly sexual in nature. It was noted in *Ellison v. Brady*, 924 F.2d 872, n.4 (9th Cir. 1991), that other circuits have recognized such a cause of action. The Court will assume that Lansdale's allegation of harassment, based on gender-biased remarks, is a viable cause of action pursuant to Title VII. Therefore, this case hinges on whether or not Chalpin's comments to Lansdale were sufficiently severe or pervasive to create a hostile working environment.

Title VII, 42 U.S.C.A. §2000(e)-2(a)(1), makes it unlawful for an employer to fail or refuse to hire or to discharge or otherwise discriminate against any individual with respect to her compensation, terms, conditions or privileges of employment because of such individual's sex. The workplace environment is deemed one of the "terms, conditions or privileges of employment" and thus, if an individual is subjected to a hostile work environment based upon their gender, Title VII creates a cause of action. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2403-05 (1986).

In *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993), the Supreme Court reiterated the standard by which workplace conduct was to be measured.

> This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in Meritor, 'mere utterance of an . . . epithet which engenders offensive feelings

> in an employee' does not sufficiently affects the condition of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation.

The Court in *Harris* went on to state that determining whether a work environment is hostile is not a mathematically precise test. Fact finders should make such a determination by looking at all the circumstances, including the frequency of the alleged conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.* at 371. In the present case, Lansdale alleges that Chalpin made at least thirty sexual or gender biased comments during the eight months she was employed by Hi-Health.[6] As taken from Plaintiff's Statement of Facts[7],

---

6. Hi-Health has not disputed that it is liable for Chalpin's conduct. Because Chalpin was the owner and president of Hi-Health, he held a sufficiently high position in the management hierarchy of the company for his actions to be imputed automatically to the employer. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2284 (1998) (citing *Torres v. Pisano* 116 F.3d 625, 634-35 and n.11)).

7. Defendants state that "the Court may assume that Chalpin made all of the statements attributed to him" for purposes of this motion only. Reply at 9.

Appendix D

Chalpin advised Lansdale that to be successful she should think with the logic of a man and that she should forget that she was a woman in negotiations. Chalpin stated to a prospective job candidate that "we're a slow moving company because we have female in charge of our merchandising department." Chalpin also told this same job applicant that "I don't know how well you know [Lansdale] but I've been working with her for several months now and she really thinks and moves very slowly. Mostly, I know she can't help it. She's handicapped because of her gender." Chalpin told Lansdale that men are smarter than woman and that women are slower than men. Chalpin stated that Lansdale was "thinking like a woman again" when she proposed training buyers in how to interview people. He also told Lansdale that "you won't find a woman head of any Fortune 500 company." He also commented that woman were not good enough interviewers. The foregoing are the gender-biased remarks allegedly made by Chalpin.

Lansdale also alleges that Chalpin made sexually suggestive or sexually inappropriate remarks about her and about other women to her. Chalpin asked Lansdale to go out for dinner after work with himself and a manufacturer, when Lansdale declined due to child care responsibilities Chalpin replied "chicken, see you tomorrow." He asked her out on one other occasions saying "If you've gotten your nerve up, you can join me and a few other people for drinks after work tonight." Lansdale again declined. He also told Lansdale on more than one occasion that "you got where you are because of your looks." Chalpin commented, after Lansdale had told him that she had spent much of the Easter week-end working, "so are you telling me you are available now." In the presence

of Lansdale, Chalpin laughed with another employee about a store managers "boob job", and commented salaciously about other female employees and about pictures of women. On two occasions he observed that Lansdale was slimming up nicely and that her backside had gotten smaller. Lansdale was dieting at the time. He is also reported to have "leered" and "panted like a dog" at women he found attractive and to frequently use the words "boobs" and "prick" in Lansdale's presence.

The remarks, taken individually, cannot be said to reasonably constitute harassment or to create a hostile environment. Lansdale makes no allegations that Chalpin ever touched her inappropriately or pressured her to have any type of sexual relationship. On the two occasions in which Chalpin asked Lansdale to see him after working hours, other professional people were to be present. However, the relevant question is whether a reasonable woman would consider all of Chalpin's alleged comments, taken together, sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment. *See Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). As noted above, the fact finder must consider the totality of the circumstances in evaluating whether or not conduct created an hostile or abusive working environment. Fact finders should make such a determination by looking at all the circumstances, including the frequency of the alleged conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether is unreasonably interferes with an employee's work performance. *See Harris v. Forklift Systems, Inc.*

Appendix D

Lansdale enumerates approximately thirty incidents of alleged inappropriate behavior. She was employed at Hi-Health for approximately eight months. Although it does not appear that the offensive conduct occurred daily or even weekly, and Lansdale and Chalpin may have argued loudly and disagreed often over matters unrelated to his biased or offensive conduct, plaintiff has provided sufficient evidence from which a reasonable fact finder could conclude that she was subjected to a hostile environment within the purview of Title VII.

The Court finds that there is a genuine issue of material fact in dispute as to whether defendants' conduct was sufficiently severe or pervasive to alter the conditions of plaintiff's employment and accordingly, will deny defendant's motion for summary judgment on plaintiff's hostile environment claim.

Retaliation

Hi-Health alleges that Lansdale's claim of retaliatory discharge is not properly before this court as she failed to allege retaliation in her EEOC complaint. The Court agrees.

Plaintiff concedes that she failed to allege retaliation at the administrative level but contends that requiring her to set forth her retaliatory discharge claim in the charging document is a hyper technicality. Response at 15. In the charging document, plaintiff checked the box for sex discrimination and failed to check the box marked, retaliation. Charges before the EEOC or a state agency are to be construed liberally, but an employee may not bring suit for incidents not listed

in her charge unless they are "like or reasonably related to the allegations of the EEOC charge." *Stache*, 852 F.2d at 1233-34 (internal quotations omitted). "When an employee seeks judicial relief for incidents not listed in his original charge, the judicial complaint may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts." *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). The rationale behind *Oubichon* is to "avoid creating needless procedural barriers." *Id.* The exhaustion requirement can lead to needless procedural barriers because, "[i]f closely related incidents occur after a charge has been filed, additional investigative and conciliative efforts would be redundant." *Brown v. Puget Sound Elec. App. & Train. Trust*, 732 F.2d 726, 729-30 (9th Cir. 1984).

On the other hand, "[w]here claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated. . . . 'It is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" *Id.* at 730 (quoting *Serpe v. Four-Phase Systems, Inc.*, 718 F.2d 935, 937 (9th Cir. 1983)).

Here, plaintiff already had been discharged from her employment when she filed her charge of sexual discrimination. DSOF, Exh. 7. Plaintiff offers no rationale whatsoever to indicate why she failed to note retaliation in the charging document. Plaintiff offers no authority supporting her contention that retaliation is so closely related

to the type of sexual harassment plaintiff asserted in the charging document that the EEOC would likely have expanded its investigation beyond plaintiff's claim of hostile environment. Moreover, there is no evidence that the EEOC's investigation included retaliation. Thus, plaintiff has not properly exhausted her retaliation claim. Moreover, even if the Court found that plaintiff's retaliation claim had been exhausted, Lansdale has failed to make out a case for retaliatory discharge. To make out a *prima facie* case of retaliation, Lansdale must show that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken and that a causal link exists between these two events. *Steiner* at 1464. To show the requisite causal link, the plaintiff must "present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982), Further, "[e]ssential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." *Id.* Lansdale has produced no evidence that she was terminated due to her complaints of sexual harassment. Lansdale was terminated by Chalpin. Scott Dalton, the person to whom Lansdale complained about the perceived harassment, took no action other than to offer Lansdale advice on how to handle the situation with Chalpin. It is undisputed that he did not discuss the matter with Chalpin, or make it known to any other manager at Hi-Health. Lansdale did not file a complaint with the EEOC until after she was terminated. Although Lansdale had confronted Chalpin and told him that his gender-biased comments offended her, she has not come forth with any evidence that those complaints were the real reason she was fired. Lansdale's claim for retaliatory discharge must fail as

there is no disputed material fact requiring a trial on this issue and defendants are entitled to judgment as a matter of law.

Intentional Infliction of Emotional Distress

Plaintiff alleges that she suffered emotional distress as a result of defendant Chalpin's sexual and gender-based comments and behavior. To prevail on a claim of intentional infliction of emotional distress, plaintiff must show: (1) that defendants' conduct could be characterized as "extreme and outrageous"; (2) that defendants either intended to cause or recklessly disregarded the near certainty that emotional distress would result from their conduct; (3) that defendants' conduct actually caused severe emotional distress. *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 716 P.2d 1013, 1015-16 (Ariz. 1986). Even if the second and third elements are present, the trial court must, on the first element, make a preliminary determination whether the conduct may be considered so outrageous and extreme so as to permit recovery. *Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (Ariz. Ct. App. 1969); *see also*, Restatement (Second) of Torts § 46. That issue may only go to the jury where "reasonable minds may differ." Restatement, supra. Even if a defendant's conduct is unjustifiable, it does not necessarily rise to the level of "atrocious" and "beyond all possible bounds of decency" that would cause an average member of the community to believe it was "outrageous." *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987); *Lucchesi*, 716 P.2d at 1015; *see also Walls v. Golden Age Nursing Home*, 619 P.2d 1032 (Ariz. 1980) (unjustifiable delay in failing to notify wife of husband's terminal illness

was not outrageous); *Duhammel v. Star*, 653 P.2d 15 (App. 1982) (false accusations against police officer not outrageous conduct justifying claim for emotional distress).

Having reviewed the record presented in this matter, the Court finds as a matter of law that plaintiff does not provide evidence of outrageous and extreme conduct sufficient to survive a motion for summary judgment. Chalpin's behavior is not similar to the extreme and outrageous behavior alleged by the plaintiff in *Ford v. Revlon, Inc.*, 253 Ariz. 38, 734 P.2d 580 (1987).

In *Ford*, a co-worker, Braun, physically assaulted plaintiff and repeatedly told her that he "wanted to fuck her." *Id.* at 582. Ford had a series of meetings to complain about Braun's behavior with management. Management did not address her complaints for nine months despite her obvious emotional stress and stated fear of Braun. Ford developed high blood pressure, a nervous tic, chest pain and rapid breathing. She eventually made a suicide attempt. The circumstances in this case are simply not that extreme. Chalpin's behavior does not rise to the same level of harassment as Braun's. Additionally, although Lansdale sought out Scott Dalton for advice on how to handle Chalpin's remarks, she did not seek any action on the part of the Hi-Health.

Moreover, Lansdale's reported level of distress does not rise to that alleged by the plaintiff in *Ford*. Lansdale has not obtained any medical of psychological consultation as a result of her employment experience at Hi Health. DSOF, Lansdale Deposition at 29. She does allege that she required time off

for one sick day due to the stress of working at Hi-Health and that her sleep has been affected. This is not the type of distress that reasonable minds could conclude was severe.

Based on plaintiff's own evidence, the conduct plaintiff points to is neither extreme nor outrageous. Additionally, plaintiff did not suffer severe emotional distress as a result of the alleged behavior. Summary judgment will be granted for the defendants on this claim.

Based on the foregoing,

IT IS ORDERED granting in part and denying in part defendants' motion for summary judgment. [doc. #46]. Defendants' motion is denied as to plaintiff's hostile environment claim and is granted as to plaintiff's retaliation and intentional infliction of emotional distress claims.

FURTHER ORDERED striking plaintiff's supplemental filings of May 3, 1999 [doc. #67]; May 6, 1999 [doc. #68]; and May 25, 1999 [doc. #70].

FURTHER ORDERED setting a final pretrial conference for November 1, 1999 at 4:30 p.m.

DATED this 26th day of September, 1999.

s/ Roger G. Strand
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED FEBRUARY 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV-97-02555-RGS

No. 01-16017

JILL LANSDALE,

Plaintiff-Appellant,

vs.

HI-HEALTH SUPERMART CORPORATION,

Defendant-Appellee.

No. 01-16018

JILL LANSDALE,

Plaintiff-Appellee,

vs.

HI-HEALTH SUPERMART CORPORATION,

Defendant-Appellant.

Appendix E

ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC

Before: STAPLETON,[1] O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

---

1. The Honorable Walter K. Stapleton, Senior United States Circuit Judge for the Third Circuit, sitting by designtion.